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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LORRAINE KROMNICK, LORRAINE BRANCATO, GLADYS HIRSH and REGINA KATZ,
Petitioners

v.

SCHOOL DISTRICT OF PHILADELPHIA and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF PHILADELPHIA,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether respondent School District's systematic use of race as the factor determining which individual teachers are selected for involuntary transfers violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, where full faculty integration has already been achieved in the school district.

2. Whether respondent School District's systematic use of race as the factor determining which individual teachers are selected for involuntary transfers violates Title VII of the Civil Rights Act of 1964, where full faculty integration has already been achieved in the school district.

3. Whether respondent School District's systematic use of race as the factor determining which individual teachers are selected for involuntary transfers should be judged under the "strict scrutiny" standard under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

4. Whether the trial record supports the findings made by the district court in support of its conclusion that the School District of Philadelphia's systematic use of race as the factor determining which teachers are selected for involuntary transfers is invalid under Title VII of the Civil Rights Act of 1964 and the Fourteenth Amendment of the United States Constitution, including its finding that the School District's system was not intended to serve a remedial purpose, and its finding that the School District had failed to adequately consider nondiscriminatory alternatives to the system.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, reported at 739 F.2d 894, and the opinion of the United States District Court for the Eastern District of Pennsylvania, reported at 555 F.Supp. 249, appear in the Appendix hereto.

JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on July 17, 1984 and this Petition for Certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, amendment XIV, §1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a).

> (a) It shall be an unlawful employment practice for an employer —
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,

because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

In June, 1982, the Office of Civil Rights of the United States Department of Education ("OCR"), following a review of teacher assignments in the School District of Philadelphia (the "School District") under a race-based teacher transfer system (described in detail, *infra*, pp. 5-7) determined that the School District had succeeded in "consistently maintaining" racially balanced faculties at all schools within the district. Accordingly, the School District was advised that it was no longer under any obligation to maintain the system in order to be eligible for receipt of federal funds. Rather, the School District was advised that having achieved racially balanced faculties, its sole legal obligation was to utilize a "nondiscriminatory" system in assigning teachers.

In August, 1982, the School District while agreeing with OCR's determination that no further remedial action was required, determined voluntarily to continue the existing race-based teacher transfer system.

This litigation was originally brought by four white teachers involuntarily transferred solely because of their race from schools in which they had accumulated many years of seniority and forced to select new schools from vacancy lists marked "white only". The case was later certified as a class action on behalf of all teachers, white and black, involuntarily transferred solely because of their race or restricted by race in the selection of new schools after being involuntarily transferred. The teachers challenged under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a), the voluntary maintenance by the School District of the race-based involuntary transfer system after the OCR determination that fully balanced faculties had been

achieved. Federal jurisdiction was invoked under 28 U.S.C. §1343 and 42 U.S.C. §2000e-5.

The *de facto* racial imbalance determined by OCR to have been fully remedied in 1982 was first identified by the School District itself as early as 1964.

In 1965 the School District began a strict policy of assigning newly hired teachers to schools by race in order to assure integrated faculties in all schools within the school system. In 1969 the School District, under a consent order with the Pennsylvania Human Relations Commission (PHRC), formally established numerical integration goals. Under the order, the School District sought to have at least 20% black faculties at each elementary school in the system, and 10% black faculties at all secondary schools. This consent order was completely independent of the protracted efforts by the PHRC and the state courts of Pennsylvania to achieve student desegregation.

Under the consent order, the faculty integration goals were to be achieved both by the continued assignment of newly hired teachers on the basis of race, and by restricting voluntary transfers by teachers where the transfer would create or aggravate a segregated condition in either the transferor or the transferee school. However, the consent order did not require the involuntary transfer of teachers on the basis of race to meet the goals, nor did it provide significant incentives for voluntary transfers to improve the level of integration.

Between 1969 and 1978 the School District succeeded in meeting the integration goals at virtually every school in the system. In 1978 it made application for federal funding under the Emergency School Aid Act (ESAA), 28 U.S.C. §§3191-3207 (repealed effective October 1, 1982). Despite the School District's success under the PHRC consent order, OCR determined, on the basis of a preliminary statistical review, that remaining

levels of racial imbalance created a presumption that the School District was purposely assigning teachers in a manner such as to create "racially identifiable" schools.

The School District, believing that it had successfully integrated the system, and further asserting that its long-standing voluntary commitment to integration negated any finding that it had intentionally created racially identifiable schools, disagreed with OCR's preliminary finding. However, rather than risk the loss of federal funding, the School District elected not to formally contest the preliminary finding. Instead, it accepted OCR's offer to maintain eligibility for federal funding by conforming to regulations which OCR had promulgated under ESAA for school districts determined to have engaged in discriminatory faculty assignments. 45 C.F.R. §185.44(d)(13) (1978) redesignated 34 C.F.R. 280.30(c) (1980) (repealed effective October 1, 1982). These regulations required the immediate racial balancing of the faculties at each and every school within the school system within much stricter numerical limits than those resulting from the School District's consent order with the PHRC, or even under OCR's presumptive standard for measuring integration.

Under these regulations, each school at each level within the School District (elementary, junior high, senior high) was required to employ no less than 75% and no greater than 125% of the proportion of black teachers employed system-wide by the School District at that particular level. This system was referred to by the School District itself at trial in this case and by the district court's decision as the "75%/125% quota system".

Because OCR required immediate compliance with the limitations, the School District in September, 1978 was for the first time required to involuntarily transfer teachers on the basis of their race.

The 75/125 quota system thereafter remained in effect during the 1979, 1980, 1981, and 1982 school years without modification. It operated as follows:

Each summer, each school determined the number of teachers required in each teaching classification at the school, based on projected enrollment statistics and subject preferences of students.

Because teachers accrue "school seniority" under collective bargaining contracts, teacher rosters for one year were preliminarily used to determine teacher assignments for the next year.

In some schools, summer attrition of teachers caused the school to fall out of the racial balance required by the 75/125 quota system, thus requiring the involuntary transfer of teachers solely on the basis of race to keep the school "racially balanced" even though no involuntary transfers would otherwise be required to properly staff the school.

For example, evidence adduced at trial in this case established that, in the 1982-1983 school year, there were 18 class-room positions available at the Blankenburg Elementary School. Attrition had reduced the number of classroom teachers on the school seniority list to 11 black teachers and 7 white teachers. Had it not been for the 75/125 quota system, all 18 teachers would have been permitted to remain in their existing assignments. However, because the number of black teachers exceeded the quota permitted for the school, two black teachers were involuntarily transferred out and the resulting vacancies were placed on "white only" vacancy lists.

The quota system also had an impact in schools suffering declining enrollments. For example, at the Fitzpatrick School, the number of positions for the 1982-1983 school year was reduced from 36 to 31. Even after attrition, one additional grade school teacher was required to be involuntarily transferred out to staff the school. Because the transfer of the least senior teacher, a black teacher, would have resulted in the permissible

quota for white teachers having been exceeded, a white teacher was instead involuntarily transferred, solely because of her race, to keep the school "racially balanced."

Additionally, the quota system was utilized at the start of each school year to restrict the selection rights of all involuntarily transferred teachers who, due both to the quota system as well as much more substantial shifts in teacher allocation, were required to be reassigned. At this stage of the process, the group of all teachers in the reassignment pool selected new schools from vacancy lists which identified positions as "black only," "white only" or (by silence) available to either race in accordance with the dictates of the quota system. The teachers selected new schools from these racially restricted lists on the basis of their seniority within the school system. The racial restrictions on the vacancy lists were updated on a continuous basis to insure strict adherence to the quota system.

As applied by the School District, there are no exceptions to the quota system. No temporary imbalances, regardless of the cause, are tolerated. No amount of comparative seniority difference will prevent a teacher of one race from being involuntarily transferred if the effect will be to have the faculty of a single school fall outside the balance, even by a percentage point. No consideration is given to merit, special subject competence or factors other than race.

The effect of superimposing, beginning in 1978, these strict racial limitations on top of the race-conscious policies in effect since in 1965 was to achieve the thorough and complete integration found by OCR in 1982. The integration process was also aided by the vast numbers of new hires assigned by race since 1964, steady retirement of pre-1964 hires, and by the fact that teachers involuntarily transferred by race carry their school seniority from their transferor schools to their new

schools, minimizing the possibility that teachers forcibly transferred by race will cluster at the low end of school seniority lists.

Studies made by the School District and introduced into evidence by plaintiffs verified the conclusion of OCR that School District faculties as of 1982 were well integrated, and that very few schools had clusters of teachers of one race at the low end of the seniority list.

Because of this, the School District estimated that in 1982, only 50 to 60 teachers out of 12,000 employed by the School District were transferred on the basis of race to avoid schools from falling outside the 75/125 limits.

Accordingly, the School District admitted at the trial in this case that its decision to maintain the use of the 75/125 system was not based on any concern that abandonment of the system as applied to the selection of teachers to be involuntarily transferred out of schools would threaten the successful system-wide integration previously achieved.

Rather, the decision was based on the fear by the School District's personnel staff that if the use of the "white only" and "black only" vacancy lists were abandoned and if the total pool of involuntarily transferred teachers were permitted, as they had been prior to 1969, to select new schools on the basis of "free choice" in order of school system seniority, integration levels would be threatened, and a possible reversion to pre-1969 levels of *de facto* segregation might occur. This conclusion was premised on the view of the officials that the "free choice" would be exercised in a pattern, with white teachers tending to choose schools in which white students were in the majority and black teachers tending to choose schools in which black students were in the majority.

In January, 1983, the district court determined that this motivation on the part of the School District provided an inadequate justification for the continued voluntary maintenance after 1982 by the School District of the

75/125 system under both the Equal Protection Clause and Title VII. (A-40-A-55).

Following examination of the statistical evidence of integration, the district court determined that any evidence that the integration levels in the School District were likely to recede was "sheer speculation". 555 F.Supp. at 254 (A-50). The district court further found that the School District had not given any proper consideration to "nondiscriminatory" or "merit" systems which plaintiffs argued were viable alternatives to both the race-based 75/125 quota system and the "free choice" system which School District officials feared would lead to a reduction in integration levels.

In order to avoid disruption of classes in the middle of the 1982-1983 school year, the district court did not order the immediate return to their original schools of any teachers transferred on the basis of race after August 1982. (A-55) Thereafter, an order was entered requiring that such teachers be returned to their original schools prior to assignments being made for the 1983-1984 school year. (A-56)

The district court's orders were stayed by the United States Court of Appeals for the Third Circuit pending an appeal by the School District. The court of appeals thereafter reversed the district court, finding that the voluntary use by the School District of the race-based involuntary transfer policy did not violate either the Equal Protection Clause or Title VII. (A-1-A-39, A-59-A-60)

Accordingly the 75/125 system has remained in effect through the present, with teachers transferred on the basis of race in the summers of 1983 and 1984.

ARGUMENT

1. WHETHER THE MAINTENANCE OF A SYSTEM BY A PUBLIC EMPLOYER IN WHICH INDIVIDUAL EMPLOYMENT DECISIONS ARE MADE ON THE BASIS OF RACE VIOLATES THE EQUAL PROTECTION

CLAUSE OF THE FOURTEENTH AMENDMENT OR TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 ONCE THE REMEDIAL OBJECTIVE WHICH LED TO THE ESTABLISHMENT OF THE SYSTEM HAS BEEN ACHIEVED IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

While the court of appeals struggled to evade the finding by the district court that the School District's post-August, 1982 maintenance of the 75/125 quota system was non-remedial, and thereby avoid an exacting level of constitutional scrutiny, two core facts in this case remain undisputed.

First, the full and complete faculty integration which was the objective of the 1964-1982 race-conscious employment policies has been achieved. The faculties of each school in the School District are not merely integrated; they are "racially balanced."

Second, despite the achievement of this objective, the individual plaintiffs suffer discrimination on the basis of their race; they are told point-blank by the School District, "because of your race, you must be transferred from the school where you have taught for the last ten years."

With respect to the level of racial balance achieved, it is noteworthy that the School District before deciding to continue the 75/125 system did not challenge the finding of OCR that it had succeeded in fully integrating its faculties; to the contrary it agreed with that conclusion.

The School District's Executive Director of Personnel and Labor Relations, whose recommendation was the sole basis of the School District's decision to continue the system admitted at the trial in this case that his recommendation was not based upon any need to further remedy the effects of prior discrimination:

> Q. You did not base your recommendation on any analysis which showed that you needed to rem-

edy prior wrongs which you had committed? In other words, you didn't say to the Board, "We need to wipe out the effects of what we have done in the past; therefore, we have to continue the quota system.

A. I did not. (Trial Transcript 1-58:10-15).

Accordingly, this case calls upon the Court to redeem the promise that "the Constitution envisions a Nation where race is irrelevant" *Fullilove v. Klutznick*, 448 U.S. 448, 516 (1980) (Powell, J, concurring). It calls upon the Court to determine whether the use of race as the determining factor in employment decisions by a public employer, a means endorsed by the Court solely to rectify past wrongs by the employer, should be allowed to become the public employer's permanent policy.

While respondents have not hesitated to invoke the Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) in favor of their policy, petitioners can conceive of no greater reinforcement of the legitimacy of *Brown* than a reaffirmation of the principle that the race-conscious remedial policies demanded by *Brown* and its progeny are merely transitional steps en route to a future where race is irrelevant. The fact that the promise of *Brown* has yet to be realized in all school districts should not be permitted to justify race-based faculty transfers in a School District, which at least insofar as faculty assignments are concerned, has fully, faithfully and consistently adhered to *Brown*.

In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), five justices of this Court rejected the argument that broad social concerns over the place of minorities in society justify acts of discrimination against individuals not designed to remedy prior acts of discrimination by the governmental authority engaging in the discrimination. By implication, the majority also rejected the argument that differing levels of legal protection are available to members of certain racial groups. It thereby preserved the unbroken line of precedent holding that

the Fourteenth Amendment and Title VII protect individuals, not groups, against differential treatment on the basis of race. *E.g. Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S., 273, 278-85 (1976).

In *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979), the Court, while sanctioning some affirmative action programs under Title VII, emphasized that its ruling was narrowly aimed at supporting a "temporary measure . . . not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."

This case differs from *Bakke* only in that the racially-motivated employment policies originally were intended to correct *de facto* racial imbalances. It differs from *Weber* in that respondents admit that their purpose is to maintain racial balance, not eliminate a manifest imbalance.

This case thus provides the Court with its first opportunity to determine whether traditional prohibitions on the governmental consideration of race should take effect once the remedial objectives of race-based employment policies are satisfied. The finding by OCR that the School District had achieved its remedial objective of fully integrating its facilities and the independent finding by the District Court that integration would not be impaired by abandonment of the remedial program provide a clear record on which to adjudicate this undeniably important issue.

While subsidiary issues such as whether "strict scrutiny" should be applied to judge the constitutionality of the 75/125 system and whether the district court's findings are adequately supported in the record also necessarily must be decided, the overriding concern of petitioners is that the court of appeals decision sanctions the permanent sacrifice of their rights as individuals to be free from racial discrimination in the name of "proportional representation" of the races on all faculties within the School District.

The court of appeals decision permanently bars any challenge to the School District's maintenance of the 75/125 system for two reasons. First, the School District's justification for the maintenance of the 75/125 system is not linked to the achievement of any specific integrational objective; to the contrary, its claim that replacement of the 75/125 system with a "free choice" system would threaten racial balance is one that can be made regardless of the passage of time. So long as the School District's fear of any alternative — even though there are numerous color-blind alternatives to the race-based transfer system besides the"free choice" system — is permitted to insulate its policies from judicial review, petitioners have no remedy under the Fourteenth Amendment and Title VII.

Second, the court of appeals' reasoning in support of its view that the quota system is remedial and justifiable, that "Until the Philadelphia school system achieves racial balance as to students as well as faculty, the ultimate goal of improved educational opportunity through racial diversity cannot be attained" 739 F.2d at 906 (A-27), illogically ties continued faculty quotas to student integrational objectives which the School District itself has abandoned.

The court of appeals ignored the testimony of the School District's associate general counsel at trial that the numerical faculty integration goals achieved under the School District's consent order with the Pennsylvania Human Relations Commission were independent of the court-ordered student desegregation efforts engaged in by the School District. The PHRC has never accused the School District of discrimination in faculty assignment, and no desegregation decree exists requiring such faculty quotas.

Ironically, the lengthy student desegregation proceedings discussed in the court of appeals opinion have

now been terminated with a consent decree in which the School District and PHRC have abandoned as unachievable full student integration on a system-wide basis.

Thus, while the court of appeals purported to leave the door open to future reevaluation of the 75/125 quota system, there could never be a proper basis for reexamination under that court's application of the Equal Protection Clause and Title VII. In effect, the court of appeals has unreasonably expanded the narrow reach of *Weber* under Title VII and narrowly construed Bakke's prohibition on racial classifications to legitimize a public school district's permanent maintenance of proportional representation on its faculties, and its race-determinative means of achieving such proportional representation.

2. THE THIRD CIRCUIT DECISION IN THIS CASE SIGNIFICANTLY EXPANDS THE PERMISSIBLE USE OF RACE AS A CRITERIA IN EMPLOYMENT DECISIONS BY PUBLIC EMPLOYERS, CONFLICTING IN PRINCIPLE WITH PRIOR DECISIONS OF THIS COURT AND OF OTHER CIRCUIT COURTS.

Once the 75/125 system is properly viewed as a permanent faculty quota system, not designed to remedy either *de jure* or *de facto* discrimination in the assignment of faculty, it is evident that the system's reliance on race-based employment decisions is outside the extremely limited use of racial employment policies approved by this Court. In *Regents of the University of California v. Bakke*, *supra*, 438 U.S. at 302, Justice Powell observed that this Court has "never approved preferential classifications in the absence of proved constitutional or statutory violations." To the contrary, the Court has sanctioned use of racial classifications by the government only in the following instances:

— As a remedy for clearly determined constitutional violations. *E.g.*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

— As a remedy for identifiable victims of statutory violations. *E.g., Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).

— As a remedial device fashioned by Congress under the "comprehensive remedial power" vested in Congress by the Fourteenth Amendment. *Fullilove v. Klutznick, supra.*

This case does not fit within any of the above categories. Nor, in light of the uncontested fact that faculties in the School District are fully integrated, does it come within the precedent of decisions sanctioning the voluntary use of racial classifications by governmental bodies of appropriate authority to remedy clearly determined constitutional violations identified by the authority. *E.g. Detroit Police Officers' Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied* 452 U.S. 938 (1981).

To the contrary, it is the absence of any finding by the School District of Philadelphia or any other appropriate authority that further action was necessary to remedy past discrimination in teacher assignments which caused the District Court to conclude that "the salient and ultimately fatal characteristic of the District's quota system is that its only function is to preserve the existing racial percentages." 555 F.Supp. at 255 (A-52). The Court has never sanctioned the proportional representation of the races on the staffs of public employers as a compelling constitutional goal, let alone a goal which may be pursued by race-based employment decisions, without exploration of nondiscriminatory alternatives.

In both *Regents of the University of California v. Bakke, supra* and *Firefighters Local Union No. 1784 v. Stotts*, ____ *U.S.*, ____ *104 S.Ct. 2576, 81 L.Ed.2d. 483 (1984)* the Court rejected governmental race-conscious measures employed for "benign" purposes, where those measures were not custom-tailored to satisfy specific remedial objectives.

The court of appeals distinguished *Bakke* and *Stotts* on the grounds that the quota system in this case does not, on its face, disadvantage or prefer any one racial group over the other. It thus ignored as irrelevant the individual instances in which a teacher of one race was singled out for involuntary transfer only because of that teacher's race and the impact on individuals of a system which fills its vacancies from lists of schools in which vacancies are marked "white only" or "black only". The court of appeals decision thus conflicts with numerous decisions of this Court holding that "the rights created by the first section of the Fourteenth Amendment are, by its terms guaranteed to the individual." *Shelley v. Kraemer*, *supra*, 334 U.S. at 22.

The Third Circuit decision in this case also conflicts in principle with the decisions of two other circuits.

In *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757 (6th Cir. 1983), the court vacated a district court decision which imposed faculty racial quotas as an adjunct to a prior desegregation decree ten years after the initial implementation of the decree.

Unlike as in *Stotts*, the original decree in *Oliver* was based on specific findings that the School District had engaged in unlawful discrimination. Nevertheless, the Sixth Circuit held that in light of the successful ten year effort of the Kalamazoo School District to overcome the effects of the prior discrimination, the use of racial employment policies improperly subjected teachers to discrimination in the absence of any further need to remedy a violation of students' constitutional rights. 706 F.2d at 757.

Similarly, in *Fort Bend Independent School District v. City of Stafford*, 651 F.2d 1133, 1140 (5th Cir. 1981), the court of appeals held that prior discriminatory faculty assignments by a school district had been "adequately remedied by the non-discriminatory employment practices and affirmative action programs" maintained over eight years. Accordingly, it reversed a district court de-

cision which had the effect of allowing the school district to block a redistricting plan that threatened its faculty racial quotas. The Fifth Circuit held that the lower court had misapplied that court's landmark decision in *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir.1969) approving faculty quotas as a "limited remedial device designed to deal with only one of many problems encountered in the course of dismantling a dual school system." 651 F.2d at 1139.

The court cited several Fifth Circuit decisions for the proposition that "no decision of this court requires that the teachers in any system or in any school be maintained at any arbitrary ratio." 651 F.2d at 1140 quoting *Lee v. Macon County Board of Education*, 482 F.2d 1253, 1254 (5th Cir. 1973).

In this case, the School District has not only frozen the proportion of teachers at every school at an arbitrary level; it maintains the ratio by making individual employment decisions on the basis of race.

In the absence of any finding by the School District that further remedial action is required, the court of appeals decision expands the permissible use of racial quotas, necessitating review by this Court.

3. THE ISSUE OF THE APPROPRIATE STANDARD OF SCRUTINY TO BE APPLIED UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO JUDGE THE VALIDITY OF RACIAL CLASSIFICATIONS IS A CONSTITUTIONAL ISSUE OF GREAT SIGNIFICANCE ON WHICH THE LACK OF CLEAR PRECEDENT FORM THIS COURT HAS LED TO CONFUSION IN THE LOWER COURTS.

In analyzing the legitimacy of the 75/125 system, the court of appeals observed that, "the absence of an Opinion of the Court in either *Bakke* or *Fullilove* and the concomitant failure of the Court to articulate an analytic framework supporting the judgments makes the position

of the lower federal courts considering the constitutionality of affirmative actions programs somewhat vulnerable." 739 F.2d at 901 (A-17).

In the absence of such a framework, the court of appeals criticized the district court for applying strict scrutiny and instead examined the 75/125 system under a "middle tier" form of scrutiny. The court, adopting an Eleventh Circuit analysis of Chief Justice Burger's opinion in *Fullilove*, purported to examine (1) The importance and validity of the remedial aim, (2) The competence of the agency to choose such a remedy, and (3) The tailoring of the remedy so as to limit the burden suffered by others. 739 F.2d at 904 (A-21).

Petitioners assert that this application of Chief Justice Burger's *Fullilove* opinion was improper. Unlike this case, *Fullilove* involved remedial action by Congress under the express authority of Section 5 of the Fourteenth Amendment. Moreover, *Fullilove* dealt with a program which was unquestionably remedial and did not address the appropriateness of the continuation of the remedial program after its remedial objective had been achieved.

The instant case provides the Court with an opportunity to clarify the standard, and to adopt the position of Justice Powell in his *Bakke* opinion that,

> "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." 438 U.S. at 291.

Especially in cases of racial classifications not designed to benefit specific victims of discrimination, the application of strict scrutiny would require lower courts to analyze not only whether a particular racial employment policy of an employer served a compelling objective, but also, as articulated by Justice Powell in *Bakke*, whether the means utilized by the governmental body was absolutely necessary, rather than simply related to, the achievement of the objective.

Thus, the district court in this case observed that the School District's generalized objective of "maintaining desegregated school faculties in order to enhance the educational opportunities of the school children is indeed a legitimate and important objective." 555 F.Supp. at 254 (A-50).

However, it was convinced that the 75/125 system was not properly tailored to meet this objective for two reasons.

First, the goal of the 75/125 system is not simply "desegregated faculties" (i.e., the absence of separate faculties, black and white, throughout the system). The goal is "proportional representation" of the races on each and every faculty.

Second, once desegregation rather than proportional representation is recognized as the only proper goal, the fact that the transfer of teachers on the basis of race helps maintain desegregation should not legitimize such transfers in the absence of proof that racially diverse faculties cannot be maintained through non-discriminatory means.

The School District did not present at trial any evidence or argument that any of numerous alternatives to "free choice" would cause its currently well-balanced and precisely proportioned system to become racially imbalanced, its counsel ultimately conceding in closing argument:

> MR. HOROWITZ: [School District Counsel]. . . So that if there is no racial restriction on transfers into a school, if it is freedom of choice, I think the evidence shows conclusively that the faculties would become imbalanced.
>
> THE COURT: What if there were other incentives, though? What if a black teacher lived in a black community and under this system was in a District school but was involuntarily transferred out and had the right to select a school and said, "I think I will

select a school in my neighborhood because it is close by and I will avoid the hassle of travel and the expense of travel and the uncertainties of the weather." That would just be a basic geographical consideration, and maybe a heavy one, and it so happens that the black teacher ends up in a school where the student body is predominantly black, and you have this tendency to have that happen.

What if the black teacher, though, is told, "For Incentive X or Y, even though there is a problem with travel and the like," for certain incentives, there may be an ability to alleviate that problem maybe other than race, just some other incentive. Is that something that should be considered? I am just asking you on that.

MR. HOROWITZ: It is very possible. I am not going to stand here and say it shouldn't be considered. I doubt that Mr. Goldich [counsel for petitioners] would come up with the kind of ideas that he came up with but he came up with, you know, different —

THE COURT: We begin with the difficulty of a quota. Just the word, you know, sends chills up and down everybody's spine. Now, if there is a strong, good reason to have a quota, that's the method that has to be swallowed.

I think the plaintiffs are saying, "Why do I have to swallow it now? Any yardstick in the world shows that it is all straightened out. Let's get rid of it. . ." (Transcript of Oral Argument of December 3, 1982 at pp. 16-17).

The court of appeals decision not only freed the School District of any legal obligation to consider color-blind alternatives, but also rejected petitioners' alterna-

tive argument that at the very least race-conscious, rather than race-determinative transfer policies were mandated by Justice Powell's determinative opinion in *Bakke*.

Under the district court's application of *Bakke*, the School District would not be barred from taking racial and ethnic considerations into account in making individual employment decisions designed to assure racially diverse faculties. The School District would not be barred from aggressively recruiting teachers of a particular race to fill vacancies on faculties which develop shortages of that teacher's race or offering incentives to encourage teachers of a particular race to teach in schools where that teacher's race is in the minority. It would be barred only from its present method of arbitrarily restricting employment opportunities by race and singling out individuals on the basis of race for involuntary transfer to meet the arbitrary restrictions imposed by its proportional representation policy.

Thus, the district court, properly applying strict scrutiny, engaged in a limited incursion on the rights and obligations of the School District in staffing its schools. Finding no evidence that faculties would become resegregated if the discrimination against plaintiffs ceased, it directed the School District to explore nondiscriminatory alternatives to the quota system. The court did not dictate that the School District adopt the "free choice" method feared by the School District, or absolutely forbid all racial considerations.

4. REVIEW BY THIS COURT IS NECESSARY TO MAINTAIN THE ROLE OF DISTRICT COURTS AS THE FINDERS OF FACT IN CASES OF RACIAL DISCRIMINATION.

A critical element in the district court's holding invalidating the continued maintenance of the 75/125 quota system was its finding that the School District's evidence

that abandonment of the system would lead to a reversion to prior levels of segregation was "sheer speculation." 555 F.Supp. at 254 (A-50).

This finding resolved a hotly contested factual issue at trial. Petitioners' evidence included a substantial presentation of raw statistical evidence which petitioners argued demonstrated conclusively that integration had been so thoroughly achieved, that it would not be affected even by the "free choice" system feared by the School District. The School District countered with a statistical analysis by its Director of Teacher Placement in an effort to prove the contrary. The District Court's"sheer speculation" finding reflected its acceptance of petitioners' analysis, and petitioners' argument that the Director of Teacher Placement's testimony was thoroughly discredited on cross-examination.

Completely ignoring petitioners' evidence and cross-examination, the court of appeals peremptorily stated that the district court's characterization of the School District's evidence as "sheer speculation" was "clearly erroneous." 739 F.2d at 908. (A-31)

In *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), this Court reaffirmed the proper role of district court judges in evaluating conflicting evidence concerning discriminatory intent and in making ultimate factual findings not subject to independent factual review by the court of appeals.

Applying this precedent, it was in this case, within the sole province of the district court to evaluate the conflicting testimony relating to possible future reversion to prior levels of segregation and to make factual findings based on its analysis. In its haste to defer to the judgment and wisdom of the School District, the Third Circuit overstepped its bounds.

The Third Circuit concluded its Fourteenth Amendment analysis by observing, "We express no opinion as to whether continued application of the 75%/125% plan would create an unconstitutional discrimination if there

is a substantial change in facts." 739 F.2d at 908 (A-32). It concluded its Title VII analysis with the statement, "We do not suggest that the School District may indefinitely operate a strict numerical transfer system . . . We hold only that the District Court erred in finding a violation of Title VII on this record." *Id.* at 911-912 (A-38-39).

Petitioners submit that the record made at trial fully supports the critical factual findings of the district court, and that these findings in turn support the legal analysis of the district court, and its conclusion that the School District's maintenance of the 75/125 system violates both the Equal Protection Clause and Title VII.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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DATED: October 15, 1984

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1144

LORRAINE KROMNICK, LORRAINE BRANCATO,
GLADYS HIRSH and REGINA KATZ

v.

SCHOOL DISTRICT OF PHILADELPHIA,
and BOARD OF EDUCATION OF THE
SCHOOL DISTRICT OF PHILADELPHIA,

Appellants

Appeal from the United States
District Court for the Eastern District
of Pennsylvania

(D. C. Civil No. 81-5013)

Argued November 29, 1983

Before: GIBBONS, SLOVITER, *Circuit Judges*,
and CALDWELL, *District Judge**

(Opinion filed July 17, 1984)

Eugene F. Brazil
General Counsel

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*Hon. William W. Caldwell, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

The School District of Philadelphia appeals from the orders of the district court permanently enjoining it from complying with its policy under which some teachers are transferred to other schools to maintain racial integration of faculty in each school. Teachers subject to transfer contend, and the district court agreed, that this policy violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* *Kromnick v. School District*, 555 F. Supp. 249 (E.D. Pa. 1983). We reverse the judgment of the district court.

I.

FACTS AND PROCEDURAL HISTORY

A.

Challenged Policy

Under the policy challenged in this action, the Philadelphia Board of Education seeks to maintain a faculty ratio at each school of between 75% and 125% of the system-wide proportions of white and black teachers.[1] As a result, the racial composition of each school's faculty reflects that of the overall teaching staff.

To reach this objective, the School District annually reassigns some classroom teachers to other schools. The reassignment plan operates in two phases. First, there is a determination of the need for staff at each school. Because of declining student enrollment, each year many schools have fewer positions. Open positions are staffed in order of accumulated seniority at the school, and the least senior teachers are transferred from the school. However, if that would cause the school to fall outside the 75%/125% range, teachers of the overrepresented race are transferred even though they have more seniority. Also, if retirements cause a racial imbalance in the school's faculty outside the 75%/125% range, again the least senior teachers of the overrepresented race are transferred even though they may have more seniority than teachers of the other race. Only a small percentage of teachers transferred are transferred in derogation of seniority. In the last year, approximately 50 or 60 of the 1,100 teachers transferred were transferred to maintain the 75%/125% racial balance.

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1. These proportions are calculated separately for each of the three levels of compulsory public education, elementary, junior high and high school. App. at 119a-20a.

In the second phase of the reassignment plan, all the transferred teachers are entitled to choose new schools in descending seniority order, unless their choice would bring the selected schools outside the 75%/125% range. If so, those teachers are required to forego their preferred choice of transfer.

In considering the School District's policy, it is also necessary to keep in mind several factors. First, layoffs, as opposed to transfers, are determined by strict seniority. App. III at 185a; Brief for Appellees at 6. Second, teachers required to be transferred retain accumulated "building seniority," whereas those who seek transfers generally lose that seniority. App. II at 137a. This affects transfer rights for the following school year. Third, transferred teachers retain a "right of return," or priority to any vacancies that recur at their former schools, if return will not upset the racial balance. App. III at 192a-93a.

B.

Development of the Policy

The Philadelphia School System has long suffered from *de facto* segregation by race of students and faculty. Under Pennsylvania law, school districts may take steps to rectify a racial imbalance that is the product of *de facto* segregation as well as of *de jure* origin. *Balsbaugh v. Rowland*, 447 Pa. 423, 438, 290 A.2d at 85, 93 (1972). Also, the state, through the agency of the Pennsylvania Human Relations Commission (PHRC), may require a plan to eliminate *de facto* racial imbalances in schools. 447 Pa. at 432-33, 290 A.2d at 90; *Pennsylvania Human Relations Commission v. Chester School District*, 427 Pa. 157, 233 A.2d 290 (1967).

In 1968, the PHRC began proceedings under state law to compel the elimination of racially identifiable schools in Philadelphia. *See School District v.*

Pennsylvania Human Relations Commission, 6 Pa. Cmmw. 281, 294 A.2d 410 (1972), *aff'd as to other parties*, 455 Pa. 52, 313 A.2d 156 (1973), (*School District I*); *Pennsylvania Human Relations Commission v. School District*, 23 Pa. Cmmw. 312, 352 A.2d 200 (1976) (*School District II*); *Pennsylvania Human Relations Commission v. School District*, 30 Pa. Cmmw. 644, 374 A.2d 1014 (1977), *aff'd*, 480 Pa. 398, 390 A.2d 1238 (1978) (*School District III*); *Pennsylvania Human Relations Commission v. School District*, 66 Pa. Cmmw. 154, 443 A.2d 1343 (1982) (*School District IV*). The state courts have generally preferred to allow the School District to establish "voluntary" plans in response to prodding by the PHRC because, as the Pennsylvania Supreme Court noted, the School District has "primary responsibility for the choice and implementation of an effective desegregation program." *School District III*, 480 Pa. at 428, 390 A.2d at 1253 (quoting *Pennsylvania Human Relations Commission v. Chester School District*, 427 Pa. 157, 181, 233 A.2d 290, 302 (1967)). The most recent state court action resulted in a consent agreement for a desegregation plan involving use of "magnet" schools. Despite these lengthy proceedings, the students of the School District still attend racially identifiable schools. *See School District IV*, 66 Pa. Cmmw. at 174, 443 A.2d at 1352.

PHRC guidelines espouse integration of faculty as well as of students as a means to eliminate the racial identifiability of schools and to achieve equal education for their students. *See School District II*, 23 Pa. Cmmw. at 317, 352 A.2d at 203. In 1969, the PHRC entered into a consent decree with the School District that required each elementary school to have at least 20% and each secondary school to have at least 10% of both black and white teachers. App. II at 115a. This decree supplemented a policy imposed in 1965, and still

continuing, of assigning newly hired teachers in a manner that furthers racial balance. Appellee teachers do not attack this race-conscious initial assignment, which they consider "reasonable". Brief for Appellees at 4-5. Assignment on this basis aided faculty integration when there was an upsurge in hiring but voluntary transfers were also restricted in an effort to reach the 20% and 10% goals. *Kromnick v. School District*, 555 F. Supp. at 250.

In 1978, the School District's teacher assignment policies were again rewritten, this time because of the requirements of the federal government. In order to receive financing to assist in desegregation, the School District applied for federal aid then available under the Emergency School Aid Act (ESAA) Title VI, § 601, 20 U.S.C. §§ 3191-3207 (Supp V. 1981) (repealed effective October 1, 1982).[2] The Office of Civil Rights (OCR), of the Department of Health, Education and Welfare denied the application because the School District's desegregation plan was unsatisfactory. Among the deficiencies cited was insufficient integration of classroom teachers. The then-applicable ESAA regulations administered by OCR provided:

> No educational agency shall be eligible for assistance under the Act if . . . it has . . . any practice, policy or procedure which results in discrimination on the basis of race . . . including the *assignment of full-time classroom teachers to the schools of such agency in such manner as to identify any of such schools as intended for students of a particular race*, color or national origin.

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2. The ESAA statutory grant program was repealed by Congress in August 1981, effective October 1982, as part of a general repeal of categorical grants-in-aid. Pub. L. 97-35, Title V, § 587(a)(1), 95 Stat. 480 (Aug. 13, 1981).

45 C.F.R. § 185.43(b)(2) (1978) (emphasis added), redesignated 280.22(e) (1980) (repealed effective October 1, 1982). OCR found that teacher assignments in Philadelphia were "racially identifiable" despite the District's compliance with the numerical goals imposed under its consent decree with the PHRC.[3] In 1978 the School District's student population was 64.2% black, 6% Hispanic, and 31.6% white and its faculty was 63% white, 36% black and 1% other. OCR found that of 280 schools, 114 had 90% black students, whereas 60 schools had 80% white students. 61% of the black teachers were assigned to the schools with 90% black students, but only 8% were assigned to the schools with 80% white students. App. I at 58a-59a, 66a. OCR concluded that many schools that were racially identifiable by students had racially identifiable faculties and were "readily identifiable by the racial composition of their teaching staffs as intended for students of a particular race . . . . in violation of 45 C.F.R. 185.43(b)(2)." App. I at 59a.

OCR found that the District's teacher assignment policies had allowed too much choice of assignment for teachers in a system with *de facto* segregation. After intimating that this amounted to a conscious policy that might be unlawful or unconstitutional, the agency declined to revoke a determination of ineligibility, and concluded:

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3. OCR defined a school as "racially identifiable" for a school system with predominantly black enrollment if 90% of students were black or 80% were white. Teacher assignments were considered racially identifiable if black-identified schools had more than twice the system-wide percentage of black teachers or if white-identified schools had less than half the percentage of black teachers certified at a given level. Letter from Herman R. Goldberg, Associate Commissioner, Equal Education Opportunity Programs to Dr. Michael P. Marcase, Superintendent (June 22, 1978), App. I at 67a.

> [C]ompliance with the [PHRC consent decree] . . . was not sufficient to overcome the persistent pattern of racial identification of schools by faculty assignment . . . . In fact, the district has continued to allow teacher choice to determine teaching assignments even though, as the district representatives admitted, residential areas in the city are *de facto* segregated and teachers tend to choose schools nearest to their homes. Thus, it is our view that the natural, probable and foreseeable result of your district's teacher assignment policies was to maintain the racial identifiability of schools by the composition of their teaching staffs.

Letter from Herman R. Goldberg to Dr. Michael P. Marcase (August 8, 1978), App. I at 71a.

ESAA regulations provided for a "waiver" of eligibility if the district undertook remedial action "so that the proportion of minority group full-time teachers at each school is between 75 percentum and 125 percentum of the proportion of such minority group teachers which exists on the faculty as a whole." 45 C.F.R. § 185.44(d)(3) (1978), redesignated 34 C.F.R. § 280.30(c) (1980), (repealed effective October 1, 1982). The School Board voted to comply with this 75%/125% standard, and adopted the policy described above, which went into effect immediately for the 1978-79 school year and has been continued for each year since. As a result, the School District received federal funds annually for desegregation.

C.

Procedural History and Continued Use of the Policy

Four white teachers transferred under the 75%/125% policy, Lorraine Kromnick, Lorraine Brancato, Gladys Hirsh and Regina Katz, filed suit against the School District in December 1981, seeking

declaratory and injunctive relief as well as money damages under the Constitution, Title VII of the Civil Rights Act of 1964, and 42 U.S.C. § 1983. Plaintiffs contended that the policy was an impermissible racial classification, but did not argue that its impact fell disproportionately on whites or blacks as a group.[4]

The district court denied plaintiffs' motion for preliminary injunction primarily because the policy was mandated by OCR. *See Kromnick v. School District*, 555 F. Supp. 249, 252 (E.D. Pa. 1983). The court then granted plaintiffs' motion for certification as representatives, for declaratory and injunctive relief, of a mixed-race class of teachers affected by the 75%/125% policy.[5] The court also directed the School District to determine if OCR continued to require use of the 75%/125% policy. *Id.* at 252.

On June 23, 1982, the Office of Civil Rights of the Department of Education, now responsible for the

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4. Appellees suggested at oral argument before us that some evidence in the record would support a finding of disproportionate impact, but because this contention was never raised in the district court, we will not address it. *See* United States v. Riccobene, 709 F.2d 214, 229 (3d Cir.), *cert. denied*, 104 S. Ct. 157 (1983); Newark Morning Ledger Co. v. United States, 539 F.2d 929, 932 (3d Cir. 1976); *see also* Singleton v. Wulff, 428 U.S. 106, 120-21 (1976).

5. The class included:

> All teachers employed by the defendants who have since August 1, 1978 been involuntarily transferred because of their race due to defendants maintenance of a racial quota system; all teachers employed by the defendants who, upon being involuntarily transferred since August 1, 1978 have been prevented from exercising seniority rights in selecting new schools because of the quota system; and all teachers who will in the future be involuntarily transferred or who will be prevented from exercising seniority rights in selecting new schools because of the quota system.

555 F. Supp. at 250 n.1.

ESAA program, found the School District "substantially in compliance" with the regulations. The agency commended the system for integrating the faculty and stated that the district "is under no further obligation to continue to meet the 75%/125% standard." The agency also stated that "the district must continue to use nondiscriminatory policies" in placing teachers, and was "free to continue to maintain [the 75%/125% policy] if it so chooses." Letter from Frederick T. Cioffi, Director, Elementary and Secondary Education Division, Litigation, Enforcement and Policy Service, Department of Education to Superintendent Michael Marcase (June 23, 1982), App. II at 74a-75a.

The School Board voted, on August 2, 1982, to continue using the 75%/125% policy for the upcoming school year. Although the Board made no specific findings as to the continued need for this particular policy and did not canvass alternative race-conscious policies, the Board heard a report by its personnel department, later confirmed in a written study, that if the 75%/125% policy were abandoned in favor of free choice in teacher assignments, the level of faculty integration would slip.

At the trial on plaintiffs' motion for permanent injunction, the plaintiff teachers dropped their contention that the plan was unlawful for the years 1978-82, and limited their claims to the new period of voluntary adherence. Brief for Appellees at 3 n.2. The district court now held for plaintiffs, concluding that continued voluntary adherence to the 75%/125% policy violated the Equal Protection Clause of the United States Constitution and Title VII of the Civil Rights Act of 1964.

The court found that the policy's current purpose "is not to remedy past discrimination in teacher assignments, but to guard against the possibility that the system will revert to its pre-1978 level of racial

imbalance in faculty assignments," and therefore termed the policy "an elective racial quota." 555 F. Supp. at 252. The court held that the School District had failed to show that the policy was substantially related to achievement of the legitimate and important objective of enhancing educational opportunities for school children, because it had not demonstrated "through empirical evidence" the likelihood of reversion to prior levels of segregation, but had only presented "sheer speculation." *Id.* at 254. It held, moreover, that the School District had failed to demonstrate the unavailability of "nondiscriminatory alternatives for maintaining faculty integration." *Id.*

The court then distinguished cases from other circuits upholding such reassignment plans because in those cases the plans were remedial devices, whereas it viewed continued use of the 75%/125% policy as not remedial, but aimed at maintaining racial balance for its own sake. *Id.* The court held that continued use of the policy violated Title VII for essentially the same reasons as it violated the Constitution. *Id.* at 255-56. The court stated, "The salient and ultimately fatal characteristic of the District's quota system is that its only function is to preserve the existing racial percentages." *Id.* at 255. The policy "continues to allow race to be the sole criterion affecting employment once the desired end is actually met." *Id.*

The district court entered an order enjoining use of the 75%/125% policy as it applies to both phases of the transfer process.[6] The court initially granted only

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6. The Order provided:

> IT IS ORDERED that the School District of Philadelphia and the Board of Education . . . is hereby *enjoined* from using the 75%/125% quota system as applied to involuntary transfers in selecting teachers to be involuntarily transferred and in restricting the selection rights of teachers required to be involuntarily transferred.

555 F. Supp. at 257.

prospective relief "because of the District's good faith reliance upon the OCR determination . . . that the District could continue its use of the 75%/125% standard," *id.* at 256; however, the court later granted plaintiffs' motion to amend the judgment and ordered that defendants restore those teachers transferred after August 1982 under the challenged policy.[7]

The School District filed a timely appeal from this final order, and this court granted its motion to stay the district court's orders pending appeal. This court denied a motion to intervene by several parents of children enrolled in Philadelphia public schools, Barbara Jordan *et al.*, but allowed them to participate by briefing and oral argument as *amici curiae*. The PHRC submitted a brief as *amicus curiae* as did the Lawyer's Committee for Civil Rights Under Law and the Anti-Defamation League of B'nai B'rith, on behalf of itself and other ethnic organizations.

II.

EQUAL PROTECTION

The Supreme Court signalled the beginning of the end of institutionalized racism in *Brown v. Board of Education*, 347 U.S. 483 (1954). As the Court later stated, "School boards . . . were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. County School Board*, 391 U.S. 430, 437-38 (1968) (citations omitted). Congress joined in the

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7. The amended order required that "defendants prior to making teacher assignments for the 1983-84 school year, restore to their former schools all teachers transferred from August 1982 to January 17, 1983 (1) who can establish that they would not have been transferred but for utilization of the 75/125 quota system, and (2) who file a right to return to their former schools with defendants no later than May 15, 1983." App. I at 25a (Order of Feb. 10, 1983).

Court's view of the invidiousness of racial discrimination and passed a series of laws, including the Civil Rights Act of 1964, outlawing discrimination in many areas. Racism, however, has not been eliminated, but the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution have been restored to their intended race-conscious and remedial function. "[N]o decision of [the Supreme] Court has ever adopted the proposition that the Constitution must be color blind." *Regents of the University of California v. Bakke*, 438 U.S. 265, 336 (1978) (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ.). Rather, experience has taught us that "[i]n order to get beyond racism, we must first take account of race." *Id.* at 407 (separate opinion of Blackmun, J.). *See also Williams v. City of New Orleans*, 729 F.2d 1554, 1573 (5th Cir. 1984) (in banc) (Wisdom, J., concurring in part and dissenting in part).

In only two cases has the Supreme Court reached the merits of a party's contention that a governmental remedial program considering race as a factor violates the Equal Protection Clause of the Fourteenth Amendment.[8] In the first, *Regents of the University of*

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8. In three other cases presenting this issue, certiorari was granted, but the Court did not reach the merits. *See* DeFunis v. Odegaard, 416 U.S. 312 (1974); Minnick v. California Dept. of Corrections, 452 U.S. 105 (1981); Boston Firefighters Union Local 718 v. Boston Chapter, NAACP, 103 S. Ct. 2076 (1983). For some interesting academic comment on the avoidance of the merits in *DeFunis* and *Minnick*, *see* Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. Pa. L. Rev. 907 (1983).

Two additional cases addressed the propriety of race-conscious remedial classifications only under Title VII. *See* Firefighters Local Union No. 1784 v. Stotts, 52 U.S.L.W. 4767 (June 12, 1984); United Steelworkers v. Weber, 443 U.S. 193 (1979). We discuss these cases *infra* at III.

California v. Bakke, *supra*, decided in 1978, the Court's judgment was grounded on Title VI of the Civil Rights Act of 1964, which a majority of the Court viewed as coextensive with the Equal Protection Clause. The Court concluded that the University of California's preferential admissions program for student applicants from certain minority groups violated Title VI. The Court, however, also held that the state medical school should not be enjoined from according any consideration to race in its admissions process. 438 U.S. at 272. In the second, *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Court held that a provision of the Public Works Employment Act of 1977, requiring a set-aside of at least 10% of federal funds granted for local public works projects for purchases from minority-owned businesses, did not violate the Equal Protection Clause.

In *Bakke*, five Justices (the Chief Justice and Justices Stewart, Powell, Rehnquist, and Stevens) concluded that the preferential admission plan violated Title VI. Justice Powell was the only Justice who expressed the opinion that the plan was unconstitutional as well. Justices Brennan, White, Marshall, and Blackmun would have upheld the plan under both Title VI and the Constitution. In *Fullilove*, seven Justices concluded that a Congressionally enacted preference for minority contractors was constitutional, but did so under three separate opinions applying differing legal tests. Notwithstanding the differing views of the Justices, it is clear that a majority of the Supreme Court members have opined that not every race-conscious measure is constitutionally impermissible. Nothing in either of these cases impairs this court's earlier holding in *Porcelli v. Titus*, 431 F.2d 1254, 1257 (3d Cir. 1970) (per curiam), *cert. denied*, 402 U.S. 944 (1971), that "state action based partly on considerations of color,

when color is not used per se, and in furtherance of a proper governmental objective, is not necessarily a violation of the Fourteenth Amendment."

The absence of an Opinion of the Court in either *Bakke* or *Fullilove* and the concomitant failure of the Court to articulate an analytic framework supporting the judgments makes the position of the lower federal courts considering the constitutionality of affirmative action programs somewhat vulnerable.[9] Nevertheless, it is necessary, as a preliminary matter, to determine the level of scrutiny to be employed in reviewing a claim that state action violated the Equal Protection Clause.

In *Bakke*, Justices Brennan, White, Marshall, and Blackmun articulated a standard, similar to that developed in gender-discrimination cases, that "racial classifications designed to further remedial purposes must serve important governmental objectives and must be substantially related to achievement of those objectives." 438 U.S. at 359. Justice Powell, after distinguishing cases involving "remedies for clearly determined constitutional violations," *id.* at 300, viewed remedial classifications as "suspect," and justifiable only if the State "show[s] that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *Id.* at 305. The remaining Justices did not reach the constitutional

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9. It is clear in other contexts, where the state has imposed racial classifications that are not designed to remedy the effects of past discrimination and therefore are more likely to reflect racial prejudice and to stigmatize, that the classifications "are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of its legitimate purpose." Palmore v. Sidoti, 104 S. Ct. 1879, 1882 (1984) (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964)).

issue in *Bakke*, and therefore did not comment on the level of scrutiny.

In *Fullilove*, Chief Justice Burger (joined by Justice White and by Justice Powell, who also drafted his own concurrence) declined to adopt a specific test in his opinion but held that the minority contracting program passed constitutional muster under either of the above tests. 448 U.S. at 492. Justice Marshall (joined by Justices Brennan and Blackmun) adhered to the intermediate test articulated by Justice Brennan in *Bakke*. *Id.* at 519. Justice Stevens dissented in *Fullilove*, finding the program not "narrowly tailored," but without advocating a general theory applicable to remedial classifications. *Id.* at 552. Justice Stewart, joined by Justice Rehnquist, dissented and advocated a color-blind position that barred preferences unless ordered by a court for the "sole purpose . . . [of] eradicat[ing] the actual effects of illegal discrimination." *Id.* at 528.

The nature of the state action in this case is unique. In both *Bakke* and *Fullilove*, the governmental action imposed a preference based on race, which resulted in an undeniable detriment to members of the nonpreferred race. Thus in *Bakke*, the reservation of slots for minorities under the admissions plan created, as stated in Justice Powell's determinative opinion, "a line drawn on the basis of race and ethnic status" which meant that "white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants." 438 U.S. at 289. Similarly, in *Fullilove*, the 10% set aside for minorities concededly could "have the effect of awarding some contracts to MBE's which otherwise might be awarded to other businesses, who may themselves be innocent of any prior discriminatory actions." 448 U.S. at 484 (opinion of Burger, C.J.). Even in the context of these clear preferences, the members of the Court disagreed on the

appropriate level of scrutiny, with some members opting for a strict scrutiny standard, while others stated that an intermediate standard was appropriate when the goal was remedial.

The 75%/125% program challenged in this action creates no preference of the type usually associated with claims of "reverse discrimination." There is no contention that teachers are either hired or laid off on the basis of race. There is no contention that teachers are promoted on the basis of race. There is no contention that any classification with any monetary significance is made on the basis of race. The challenge is to a policy that only affects assignment of teachers to schools. Ordinarily, this is a function within the exclusive prerogative of the school district, unless a collective bargaining agreement imposes restrictions. In this instance, however, the collective bargaining agreement incorporates the 75%/125% policy, and has done so year after year. Since the program is racially neutral, requiring the transfer of both black and white teachers, and there has been no showing of disparate impact upon one race, it is questionable whether the policy is one effecting a discrimination of constitutional dimension.

Indeed, there is an innate inconsistency in plaintiffs' position on this issue. Plaintiffs do not challenge the constitutionality of the school district's policy to assign teachers initially to schools in such manner as will integrate the school's faculty. Furthermore, they do not suggest that the policy limiting voluntary transfer on race considerations is constitutionally offensive. They suggest no basis, grounded in constitutional principles, why involuntary transfer of teachers, unlike these other unchallenged race-conscious strategies, involves a constitutional discrimination in the absence of a contractual right that is being overridden.

No case has suggested that the mere utilization of

race as a factor, together with seniority, school need, and subject qualification, is prohibited. Since the classification is not preferential, it might most appropriately be reviewed for its rational relationship to a legitimate government objective, under which standard it would be patently valid. At most, since there is some element of racial classification, albeit not of preference, the appropriate level of scrutiny would be the intermediate level suggested by four members of the Court in *Bakke*, in which the classification was indeed preferential.

The appropriate question under that standard is whether the classification "serve[s] important governmental objectives" and is "substantially related to achievement of those objectives." *Bakke*, 438 U.S. at 359 (opinion of Brennan, J.). The School District articulates its goal as the integration of the faculties of the public schools of the City of Philadelphia so that public school pupils will have the opportunity to be taught by an integrated faculty. The district court agreed that "the governmental objective of maintaining desegregated school faculties in order to enhance the educational opportunities of the school children is indeed a legitimate and important objective." 555 F. Supp. at 254. It held, however, that the 75%/125% plan had not been shown to be "substantially related to achievement" of the objective. *Id.* It was in this regard that the district court erred. The evidence is unmistakable and unchallenged that during the period of the operation of the 75%/125% program, the goal of integrating faculties of the public schools was substantially furthered. *See, e.g.*, App. I at 75a.

Although the district court stated that it was applying an intermediate standard of review, it did not do so in fact since it imposed on the School District the burden to show by empirical evidence that the district would "revert back to prior levels of segregation" if the

75%/125% policy were not used, and that "other nondiscriminatory alternatives" could not be used for "maintaining faculty integration." 555 F. Supp. at 254. By imposing on the School District these requirements, the district court in fact was using a strict, indeed a most exacting, standard of scrutiny, one we conclude was inappropriate under these facts. In neither *Bakke* nor *Fullilove* did a majority of the Court hold that such a strict scrutiny standard was appropriate even when the racial classification imposed a preference. Thus, its use by the district court in this case cannot be sustained.

Furthermore, even if the intermediate standard of review applied above were not deemed apt, the result would be the same if we apply the more rigorous standard used to evaluate affirmative action programs under which members of minority groups are given a preference. In reviewing such a preference, Chief Justice Burger in *Fullilove* declined to select a particular standard of scrutiny and instead reviewed the racial classification against the underlying concerns common to the opinions previously expressed in *Bakke*. As an alternative holding, therefore, we adopt that course which was also utilized recently by Judge Kravitch in her opinion reviewing a challenge to a race-conscious affirmative action plan for county contracts in *South Florida Chapter v. Metropolitan Dade County*, 723 F.2d 846, 851-52 (11th Cir. 1984).

The relevant factors that emerge from the Supreme Court opinions are (1) the importance and validity of the remedial aim, (2) the competence of the agency to choose such a remedy, and (3) the tailoring of the remedy so as to limit the burden suffered by others. We do not suggest that this list is complete, but rather believe that it provides a framework in which to determine whether this plan is permissible or entails unconstitutional racial discrimination.

A.

Remedial Purpose

One of the linchpins of appellees' argument is its contention that the 75%/125% policy serves no remedial purpose and that, as a result, the legal precedent supporting a more flexible scrutiny for remedial plans is inapplicable. It bases its argument on the district court's determination that the "purpose [of the policy] is to preserve the status quo and not to remedy past discrimination." 555 F. Supp. at 256. We believe the district court's narrow view of the parameters of a remedial purpose was erroneous as a matter of law, and that its finding that the 75%/125% policy in this case was not remedial was clear error.

The district court apparently believed that once the School District was relieved by the OCR in 1982 of the obligation to maintain the 75%/125% policy, its action in continuing that policy ceased to be remedial. The district court ignored the 15 year history of state proceedings against the School District, which are still pending in state court, directed to effecting integration of the Philadelphia public school system. The long history of Philadelphia public schools as "racially identifiable" as either "white schools" or "black schools" cannot be gainsaid. As early as 1969 the School District was operating under a consent decree entered into with the Pennsylvania Human Relations Commission requiring it to remove the racial imbalance among teachers in its schools.

The opinions of the Pennsylvania courts provide graphic evidence of the continuing efforts by the PHRC to require the School District to submit a plan that would be effective in eliminating racial imbalance in its schools, the submission of plans repeatedly held inadequate by the PHRC and the Commonwealth Court, and the failure, as yet, to reach the goal of racial

balance.[10] In the context of repeated court and administrative orders to eliminate the racial identifiability of schools, the School District's plan to further this end by integrating faculty must be considered remedial as a vital part of the ongoing effort

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10. Following a 1972 decision rejecting the School District's contention that the PHRC lacked the authority to order it to submit a plan to achieve racial balance in its public schools, *School District I*, 6 Pa. Cmmw. 281, 294 A.2d 410, the PHRC ordered the School District to submit "a plan and timetable for implementation thereof that will eliminate racial imbalance [defined numerically as no more or less than 30% Negro pupils] in its schools." *See School District II*, 23 Pa. Cmmw. at 314, 352 A.2d at 201. The School District failed to submit such a plan and the PHRC obtained a Commonwealth Court order to require one by February 1974. *Id.* at 319, 352 A.2d at 204. The PHRC disapproved the plan that was submitted, involving busing and pairing, and filed a second petition for enforcement and for the appointment of a special master. A master was appointed, but his recommendations were opposed by both the School District and the PHRC. In October 1974, the Commonwealth Court ordered the parties each to submit proposed final plans. *Id.*

The 1976 decision of the Commonwealth Court on these plans found that "evidence in the record compels the conclusion that there is racial imbalance in the Philadelphia schools which can be corrected," *School District II*, 23 Pa. Cmmw. at 331, 352 A.2d at 211, and stated that "improvement of the racial imbalance in the schools is necessary." 352 A.2d at 216. Because the Court found none of the submitted plans entirely satisfactory, it ordered the District to submit by July 1, 1976 a new "plan and timetable for the practical cure in its schools of conditions of racial imbalance . . . ." *Id.* The court stated, "We expect and will require the District to make a realistic and effective proposal to integrate the schools." *Id.*

The new plan, "built around a new magnet school program," was approved by the Commonwealth Court for an interim test period, over the PHRC's objection that it was inadequate. *School District III*, 30 Pa. Cmmw. at 646, 374 A.2d at 1015. This conclusion was affirmed by the Pennsylvania Supreme Court, 480 Pa. 398, 390 A.2d 1238 (1978). After the trial period had passed, the PHRC argued that the voluntary plan was inadequate and in 1980 sought an order requiring a mandatory one.

to achieve a unitary school system. Thus, the fact that the four year federal phase of this long history concluded in 1982 cannot signify an end to the remedial nature of efforts made toward this goal. In fact, at the time of the hearing before the district court, the School District was still obligated by court order to implement a desegregation plan that would "accomplish[ ] the desegregation of schools which contain all or nearly all black students." *School District IV*, 66 Pa. Cmmw. at 177, 443 A.2d at 1353.

Furthermore, because our society has not yet achieved full integration among its component races in important areas of public life, including housing, employment, and public education, a reasonable plan designed to foster racial balance of public schools' teachers must be considered as directed toward remedying still existent racism, even without an applicable court order or pending administrative proceeding.

In Philadelphia, as around the nation, many minority students live and attend school in racially isolated regions of the city. National experience strongly suggests that, as a result, these students'

The Commonwealth Court agreed with the PHRC and found: "Thus today as in 1977 over two-thirds of all the black public school students in Philadelphia attend schools that are racially isolated containing proportions of black students in excess of 90%." *School District IV*, 66 Pa. Cmmw. at 174, 443 A.2d at 1352. The court reemphasized that "a fundamental purpose of any well-conceived desegregation effort must be to desegregate the identifiably black schools in the district and to diminish to the extent possible the racial isolation of black public school students." *Id.* at 176, 443 A.2d at 1353. The court ordered the School District to modify its plan "to correct racial imbalance" and to consider seriously such mandatory remedies as pairing of schools and race-conscious reassignment of students from closed schools. *Id.* at 180, 443 A.2d at 1355. We are informed by the parties that in 1983 they entered into a consent decree to implement the order of the Commonwealth Court.

educational opportunities have been unnecessarily limited. Schools are great instruments in teaching social policy, for students learn not only from books, but from the images and experiences that surround them. One such lesson is of a spirit of tolerance and mutual benefit, a lesson that is more difficult to absorb when schools attended by black students are taught by black teachers while schools attended by white students are taught by white teachers. As the Supreme Court recently noted in another context, "[Teachers] have direct, day-to-day contact with students, exercise unsupervised direction over them, act as role models and influence their students about the government and the political process." *Bernal v. Fainter*, 104 S. Ct. 2312, 2316-17 (1984).

The integration of faculty is a means to improve the quality of education of those who have suffered the effects of racial prejudice and segregation. *See generally* Report of the National Advisory Commission on Civil Disorders 237-45 (1968) (educational recommendations for the cities). "Proper integration of faculties is as important as proper integration of schools themselves." *Porcelli v. Titus*, 431 F.2d at 1257. As we stated in that case in upholding Newark's policy that preferred the promotion of minority teachers:

> We reaffirm the principle that faculty selection must remain for the broad and sensitive expertise of the School Board and its officials . . . . The question thus becomes, when is there such faculty distribution as to provide equal opportunities to all students and to all teachers -- whether white or Negro? Students in each school should have the same quality of instruction as in any other school.

Id. at 1257 (quoting *Kemp v. Beasley*, 389 F.2d 178, 189-90 (8th Cir. 1968)).

The integration of faculty has long been recognized

as an appropriate remedy for the effects of *de jure* segregation. *See United States v. Montgomery County Board of Education*, 395 U.S. 225, 235-36 (1969); *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211, 1217-18 (5th Cir.) (in banc) (per curiam), *cert. denied*, 396 U.S. 1032 (1970), *cert. granted and rev'd in part on other grounds, Carter v. West Feliciana Parish School Board*, 396 U.S. 290 (1970); *United States v. Jefferson County Board of Education*, 372 F.2d 836, 895 (5th Cir. 1966), *aff'd in banc*, 380 F.2d 385, *cert. denied sub nom. Caddo Parish School Board v. United States*, 389 U.S. 840 (1967).

Faculty integration is also an appropriate remedy for a system that has suffered *de facto* segregation. Congress adopted this view in enacting the funding limitations of the Emergency School Aid Act, which applied to *de facto* segregated systems in the North the same requirements as had prevailed through court orders entered as to *de jure* segregated systems in the South. *See Board of Education v. Harris*, 444 U.S. 130, 142-44 (1978) (construing the Act to operate against *de facto* segregation). It was this national policy against the effects of *de facto* segregation that caused OCR to hold Philadelphia ineligible for certain federal funds under the ESAA. The policy is no less important now that the School District operates free of federal compulsion.

Two circuits, affirming the importance of this voluntary goal, have upheld race-conscious assignment policies similar to Philadelphia's. *See Zaslawsky v. Board of Education*, 610 F.2d 661 (9th Cir. 1979) (upholding continued use of race-conscious faculty assignments after OCR no longer required it); *Caulfield v. Board of Education*, 632 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) (affirming use of "voluntary" plan developed at OCR's urging to

hire and transfer teachers to attain faculty integration). The district court distinguished these cases on the ground that, unlike in those cases, the Philadelphia School District's policy was not remedial or that its remedial purpose had been achieved. For the reasons set forth above, we find this distinction unpersuasive. Until the Philadelphia school system achieves racial balance as to students as well as faculty, the ultimate goal of improved educational opportunity through racial diversity cannot be attained. On this record, we believe the remedial nature of the 75%/125% policy is clear.

B.

Institutional Competence

A second consistent theme of the Supreme Court opinions is concern for the competence of the agency to choose a race-conscious remedy. The opinions of Chief Justice Burger and Justice Powell in *Fullilove* strongly emphasized the special competence of Congress in upholding the minority contractor legislation. *See* 448 U.S. 483-84, 490-91 (opinion of Burger, C.J.); *id.* at 500-03, 519 (opinion of Powell, J.).

These opinions do not imply that only Congress is competent to choose race-conscious remedies. *See, e.g., South Florida Chapter v. Metropolitan Dade County*, 723 F.2d at 852 (county commission); *Ohio Contractors Association v. Keip*, 713 F.2d 167, 171-73 (6th Cir. 1983) (Ohio General Assembly); *Detroit Police Officers' Association v. Young*, 608 F.2d 671, 694 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) (Board of Police Commissioners). *See also United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (upholding race-conscious New York reapportionment law).

Patently, a school district is competent to choose a race-conscious teacher assignment policy to further

educational goals. Although Justice Powell in *Bakke* reasoned that the University of California lacked competence to discern and remedy *societal* discrimination that might have affected the stream of would-be doctors, 438 U.S. at 307-09, we do not read that opinion as in derogation of the Supreme Court opinions containing broad language affirming the special competence of school districts to adopt race conscious remedies. *See, e.g., McDaniel v. Barresi*, 402 U.S. 39, 41-42 (1971). As the Court stated in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971) (*Swann I*):

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.

Moreover, the Court has several times held unconstitutional measures that would have limited a school system's power to choose race-conscious remedies. *See Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) (initiative prohibiting school district's use of busing); *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45 (1971) (*Swann II*) (law forbidding race-conscious busing is infringement on school authorities' "wide discretion" to formulate policy to achieve racial balance). The Court has consistently supported a school system's affirmative duty and discretion to take steps to remedy racial imbalance, a view that perforce applies to a policy of faculty integration. *See Zaslawsky v. Board of Education*, 610 F.2d at 661; *Porcelli v. Titus*, 431 F.2d 1257.

C.

Matching Ends and Means

The final factor to be considered under this mixed factor review is whether the plan, as continued by the School District, extends further than the established need. Appellees' primary contention, and one concurred in by the district court, is that the School District failed to show that less restrictive policies would not assure a sufficient level of integration. No Supreme Court opinion has required a competent agency to undergo a canvassing of alternatives as a constitutional prerequisite for a legitimate remedial action. The various opinions in *Fullilove* either expressly reject any requirement that the remedy chosen be the least restrictive, *see Fullilove*, 448 U.S. at 508 ("[T]his Court has not required remedial plans to be limited to the least restrictive means of implementation") (opinion of Powell, J.), or adopt a far less rigorous standard. *See id.* at 520-21 ("the means chosen . . . are substantially related to the achievement of its remedial purpose") (opinion of Marshall, J.); *id.* at 490 (Congress must proceed "only with programs narrowly tailored to achieve its objectives") (opinion of Burger, C.J.). *See also Ohio Contractors Association v. Keip*, 713 F.2d 167, 174 (6th Cir. 1983).

In examining the means we look first to the impact of the means chosen by the School District. The School District's plan requires some teachers of both races, primarily if not exclusively those with little seniority, to bear the burden of transfers and of diminished choice upon transfer. The transferred teachers retain jobs with the School District and retain accumulated seniority at their new schools. They also retain some exercise of choice of schools when it would not conflict with the 75%/125% policy and may return to their former schools in subsequent years. Moreover, the number of teachers affected has been comparatively

small in recent years. In the latest year of operation, only approximately 50 to 60 of 11,000 teachers in the system were involuntarily transferred from their former schools because of the 75%/125% policy. The vast number of teachers are transferred for other reasons, primarily changes in the numbers of students attending the school.

There is no evidence before us that the impact of the 75%/125% policy falls more heavily on one race than another and the record does not suggest that the plan imposes a great risk of stigmatizing or stereotyping racial groups or of reinforcing racist views. When compared to the effect on non-preferred groups by the contractor set-aside provision upheld in *Fullilove*, it cannot be said that the School District's policy imposes an undue burden on those teachers whose voluntary choice of school assignment is limited by the plan. Furthermore, we find it instructive that plaintiff teachers suggest as a preferable alternative to the 75%/125% plan a program under which "the School District could eliminate free choice by involuntarily transferred teachers entirely." Brief for Appellees at 49. This reinforces our conclusion that the restriction on the free choice of assignments by the School District under the plan it maintains does not impose an impermissible burden.

We deem it of some significance that the School District's plan does not impose a firm quota analogous to the 16 reserved seats in *Bakke*. Concern about and abhorrence to such fixed quotas, particularly by groups that have historically been deprived of opportunities as a result, is understandable. Although the 75%/125% ratio is indeed numerical, we view it as more flexible, since it provides a wide range of 50% within which the racial composition of a particular school's faculty may diverge from the racial proportion of teachers along the school system's lines.

Appellees assert that the 75%/125% ratios are impermissibly arbitrary choices. The fact that the ratio emanated from a federal agency that had oversight in this area tempers to some extent the inherent arbitrariness of the numerical target chosen. We recognize the force to appellees' contention that the School District could achieve its remedial end and yet allow some slippage from the 75%/125% ratios. Nevertheless, some flexibility must be afforded the School District to determine the scope of the remedy. The School District has had long experience with prior plans involving a greater range of choice in teacher placement that failed to achieve integration of faculty.

Murray Bookbinder, Executive Director of Personnel and Labor Relations for the School District, testified that he advised the School Board that in the absence of the 75%/125% policy, there would soon be a reversion to earlier levels of racial polarization of faculty. Tr. at 1-30; App. II at 125a. Because of limited open positions in the system, Tr. at 1-36, use of race-conscious assignments and voluntary transfers would not have been an adequate alternative. Herbert Kauffman, Director of Teacher Placement, persuasively demonstrated that increasing the range of teacher choice would most likely result in white teachers choosing white schools and black teachers choosing black schools. App. III at 168a-69a, 174a-75a. That was also the view of OCR, which had premised its 75%/125% requirement on that basis. *See* App. I at 71a. The district court's characterization of the School Board's concern about reversion to prior levels of segregation as "sheer speculation" is clearly erroneous. Under the facts before it, and in light of the totality of circumstances known to it, the School Board could reasonably decide to continue in effect a policy that had successfully achieved racial balance among its teachers.

None of the alternatives urged by appellees, such as the combined use of different numbers, the addition of discretionary flexibility in staffing each school, the encouragement of voluntary race-conscious transfers, and/or the continued use of race-conscious intial assignments, offers a clearly superior and effective alternative to the one selected by the School District.

We express no opinion as to whether continued application of the 75%/125% plan would create an unconstitutional discrimination if there is a substantial change in facts. Certainly it would be troubling if the School District failed to reconsider periodically the need for this policy. We conclude only that on the basis of the record before us its decision to continue use of the "narrowly tailored" 75%/125% plan after June 23, 1982 was supported by a legitimate remedial purpose, and that the district court's holding that maintenance of the policy after that date violated the Constitution cannot stand.

III.

ANALYSIS UNDER TITLE VII

The district court concluded that the School District's voluntary continued use of the 75%/125% policy violated section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). That section provides:

> (a) It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as employee, because of such individual's race, color, religion, sex, or national origin.

The scope of Title VII is broader than that of the Constitution. *See Washington v. Davis*, 426 U.S. 229, 238-39, 247 (1976). Otherwise, of course, there would have been no need to make the statute's provisions applicable to public employees. Therefore, the reservation we expressed *supra* about applying the Equal Protection Clause to a race-conscious strategy that establishes no preference is not applicable to Title VII.

On the plain language of the statute, we agree with the district court's conclusion, not contested by the School District on appeal, that the expectation of maintaining seniority at a school and the placement of teachers in new schools by reassignment may fairly be considered to constitute "terms, conditions, or privileges of employment" protected under subsection (a)(1).

It is clear that Title VII prohibits discrimination against both whites and blacks, *see McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 278-85 (1976), and protects the individual from discrimination limiting employment opportunities even if the individual's group has not suffered from discrimination on the "bottom line". *See Connecticut v. Teal*, 457 U.S. 440, 451, 453-56 (1982). "The

principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole." *Id.* at 453-54. Based on these precepts, we conclude that policies such as the School District's come within the literal language of Title VII.

The Courts of Appeals, including this court, have been unanimous in concluding that Title VII, like the equal protection clause, does not forbid race-conscious remedial action. *See Firefighters Local Union No. 1784 v. Stotts*, 52 U.S.L.W. 4767, 4781 & n.10 (June 12, 1984) (describing cases) (Blackmun, J., dissenting); *EEOC v. American Telephone & Telegraph Co.*, 556 F.2d 167, 174-77 & n.5 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *Contractors Association v. Secretary of Labor*, 442 F.2d 159, 172-74 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). As the Supreme Court has instructed in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), the language of Title VII must be read against the broad remedial purposes envisioned by Congress in passing the Act. The Court there upheld an employer's voluntary use of a racial promotional quota as a reasonable measure "to abolish traditional patterns of racial segregation and hierarchy." 443 U.S. at 204. It construed Title VII as leaving employers and unions in the private sector "free to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories." *Id.* at 197. This court adopted a similar view of Congressional intent in the *Contractors Association* case, in which we upheld an executive plan to favor minority contractors. We stated,

> To read § 703(a) in the manner suggested by the plaintiffs we would have to attribute to Congress

> the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention either from the language of the statute or from its legislative history.

442 F.2d at 173.

A similar approach is appropriate for classifications designed to achieve faculty integration for the benefit of the *students* of a segregated school system. Congress enacted Title VII, and in 1972 expanded its coverage to include employees of previously exempted state educational institutions, at a time when there was national focus on the need to continue efforts to desegregate educational facilities. *See generally*, United States Commission on Civil Rights, Fulfilling the Letter and Spirit of the Law, Desegregation of the Nation's Public Schools, 122-28 (1976) (reviewing cases and the continuing need for integration of staff). Race-conscious faculty reassignment was a commonly ordered remedy in litigation challenging such segregation. *See, e.g., Singleton v. Jackson Municipal Separate School District*, 419 F.2d at 1218, and cases cited *supra* at IIA. Had Congress, when it expanded Title VII in 1972, intended to foreclose such a remedy, it would have so indicated. Instead the legislative history of that statute shows special concern for improving the education of students through diversified staff. The Senate Report states:

> It is difficult to imagine a more sensitive area than educational institutions, where the youth of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to

> promote existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination.

S. Rep. No. 415, 92d Cong., 1st Sess. 12 (1971); *see also* H. Rep. No. 92-238, 92d Cong. 1st Sess. 17-20, *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2153-54 (special importance of remedying highly visible discrimination in public education).

Congressional recognition of the importance of integrated faculty was reiterated in passage of the Emergency School Aid Act, 20 U.S.C. §§ 3191-3207 (Supp. V. 1981) (repealed 1982), a primary purpose of which, according to the Supreme Court, was "to encourage 'the voluntary elimination, reduction or prevention of minority group isolation'" in public schools, including the racial isolation of faculties. *Board of Education v. Harris*, 444 U.S. 130, 132-33 (1979).

Thus although a classification that is overtly race-conscious might under ordinary circumstances signify a per se violation of Title VII, applying a per se analysis to voluntary policies of staff integration designed to further the education of students of *de facto* segregated public school systems would be inconsistent with the intent of Congress underlying Title VII. Because the 75%/125% policy is not a per se violation of Title VII, we must turn to the traditional framework to analyze whether it entails disparate treatment stemming from discriminatory intent, *see International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977), or whether it has a disparate impact on teachers of one race. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). As we previously stated, there has been no showing of disparate impact in this case. Thus, we need not even reach the issue presented in *Weber*, where the impact

of the affirmative action plan on nonminority workers was evident.

Although the district court did not articulate its holding that the 75%/125% policy violates Title VII in terms of the disparate treatment line of cases, it appeared to so classify it since it relied on its finding that the policy was not remedial. As we concluded in our Equal Protection discussion, *supra* IIA, we believe this record belies that finding. Thus, even if there were disparate treatment by races, which is questionable, the clearly remedial intent underlying the School Board's determination to continue the 75%/125% policy in effect vitiates any disparate treatment claim.

The facts in this case are distinguishable from those before the Court in its recent opinion in *Firefighters Local Union No. 1784 v. Stotts*, 52 U.S.L.W. 4767 (June 12, 1984). There, the Supreme Court held that Title VII, and in particular section 703(h), barred a district court from ordering that layoffs be made so as to retain black hirees who had been the beneficiaries of a prior remedial consent decree that did not itself limit seniority rights. Section 703(h), on which the Supreme Court relied and which protects bona fide seniority systems that are not the result of an intent to discriminate, is inapplicable here because the two central parties to the seniority plan, the School District and the Union, incorporated the 75%/125% policy in their collective bargaining contract, thereby agreeing that certain perquisites of seniority are to be qualified by that policy. Unlike *Stotts*, there is here no override of a bona fide seniority plan, and no requirement of race-conscious layoffs. Thus, we need not decide the issue explicitly left open by the Supreme Court in *Stotts* of whether a voluntary decision by the city to favor minorities in breach of a seniority plan would violate Title VII. *Stotts*, 52 U.S.L.W. at 4773.

Finally, the district court concluded that the policy could not be sustained because it was inconsistent with two criteria announced in *Weber*, that a plan should not "unnecessarily trammel" the interest of any employees and should be "temporary" in duration. 555 F. Supp. at 255-56. *See Weber*, 443 U.S. at 208. As we have previously concluded, the School District's transfer policy does not "unnecessarily trammel" the rights of reassigned teachers. Compared to permissible remedies chosen for desegregation, the transfer of teachers to other schools is a moderate and effective means. The 75%/125% plan achieves faculty integration in Philadelphia without overtly preferring one race over another, creating a racial impediment to advancement, or depriving employees of an attained rank. We agree with the Second Circuit which held that a similar policy does not violate Title VII. *See Caulfield v. Board of Education*, 632 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

Nonetheless, in considering any affirmative action plan designed to be remedial, the courts must not overlook the caution expressed in Justice Brennan's opinion for the Court in *Weber* that the plan be "a temporary measure", 443 U.S. at 208. The district court correctly stated that Title VII requires that a race-conscious plan cease "once the desired end is actually met." 555 F. Supp. at 255. Our disagreement with the court is with its conclusion that the end had been already met by the numerical integration of faculty. This was not the end, but a means to improve education and to undo the effects of past societal discrimination felt by minority students in a segregated system. There is no evidence that this latter end has been achieved, or that it would not be undermined by a reversion to racially identifiable faculties.

We do not suggest that the School District may

indefinitely operate a strict numerical transfer system. However, there is no indication in the record that the policy was intended to be permanent. Its continuation by the District in 1982 to meet a continuing need was not inconsistent with *Weber's* caution that such plans be "temporary." The School District will undoubtedly periodically reappraise the need for the policy. It is a formal part of the District's collective-bargaining agreement, which is subject to biennial renegotiation, and the plan operates in annual cycles, allowing for reevaluation of its continued necessity. Furthermore, the continuing proceedings before the state courts will afford an opportunity for reconsideration of the plan in light of the overall effort to eliminate racially identifiable schools in the school system. We hold only that the district court erred in finding a violation of Title VII on this record.

IV.
CONCLUSION

For the reasons set forth above, we will reverse the judgment of the district court enjoining use by the School District of Philadelphia of its 75%/125% policy for transfer and reassignment of faculty members.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LORRAINE KROMNICK, LORRAINE BRANCATO, GLADYS HIRSH, and REGINA KATZ	:	Civil Action
v.	:	
SCHOOL DISTRICT OF PHILADELPHIA and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF PHILADELPHIA	:	No. 81-5013

MEMORANDUM AND ORDER

BECHTLE, *J.* JANUARY 17, 1983

This employment discrimination class action brought by four white elementary school teachers challenges the validity of a 75%/125% quota system used by defendant School District of Philadelphia ("District") to maintain racial balance in the faculties of all of the schools (elementary, middle or junior high school, and high school) of the District.[1] Under the quota system, each school is required to employ between 75% and 125% of the existing proportion of black teachers employed city-wide at that school's respective level (elementary, middle or junior high school, and high school)

1. On March 23, 1982, the Court certified plaintiffs' claim as a class action under Fed.R.Civ.P. 23(b)(2) for injunctive and declaratory relief. The class included:

> All teachers employed by the defendants who have since August 1, 1978 been involuntarily transferred because of their race due to defendants maintenance of a racial quota system; all teachers employed by the defendants who, upon being involuntarily transferred since August 1, 1978 have been prevented from exercising seniority rights in selecting new schools because of the quota system; and all teachers who will in the future be involuntarily transferred or who will be prevented from exercising seniority rights in selecting new schools because of the quota system.

in the school system. The quota system was first imposed by the District in June, 1978 at the insistence of the Office of Civil Rights of the then existing United States Department of Health, Education and Welfare ("OCR") as a remedial device to desegregate school faculties and in order to maintain eligibility for federal school funding. On June 23, 1982, OCR informed the District that, as Philadelphia's school faculties were now successfully integrated, the District need not continue its 75%/125% quota system. Nonetheless, on August 2, 1982, the School Board of Philadelphia decided to retain the 75%/125% quota in order to maintain faculty integration.

Plaintiffs contend that use of a quota system for the sole purpose of maintaining faculty racial balance violates the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs also contend that the quota system violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*. Pursuant to plaintiffs' demand for injunctive and declaratory relief, a final injunction hearing was held on September 1 and 2, 1982, and on December 3, 1982, the Court heard oral argument. The Court's findings of fact and conclusions of law are set forth below.

I. Findings of Fact

The District currently employs over 12,000 teachers in the approximately 285 public schools in the City of Philadelphia. Prior to 1969, the distribution of black and white teachers at each level (elementary, middle or junior high school, and high school) of the school system reflected a racial imbalance. Many schools had a disproportionate number of either white or black teachers in comparison to the district-wide employment of white and black teachers. For this reason, many school faculties were "racially identifiable" as either white schools or black schools.

In 1969, the District, under a Consent Order which the District voluntarily entered into with the Pennsylvania Human Relations Commission ("PHRC"), set the following integration goals: that no elementary school would have fewer than 20% of either black or white teachers, and that no secondary school would have fewer than 10% of either race as teachers. In order to achieve its integration goals the District made certain changes in its teacher placement policy. Between 1969 and 1978, newly hired teachers were assigned to particular schools on the basis of their race and the District's needs in light of its quota. Transfers of existing teachers were similarly affected. Voluntary transfers were restricted where a transfer would create or aggravate a racial imbalance in either the transferor or transferee school. No restrictions were placed on involuntary transfers. Between 1969 and 1978, as a result of these policy changes, the District made substantial progress toward the integration goals established by the Consent Order.

In 1978, the District applied for federal aid under the Emergency School Aid Act, Pub.L. 89-10, Title VI, §601, as added Pub.L. 95-561, Title VI, §601(a), 92 Stat. 2252 (codified at 20 U.S.C. §§3191-3207) (repeal effective Oct. 1, 1981) ("ESAA"). In response to this application, OCR undertook a study of the District teacher assignments and the resulting percentages of black and white teachers at the various schools in the District. On the basis of this investigation and statistics submitted by the District, the OCR determined that despite the District's efforts pursuant to the 1969 Consent Order, a number of the Philadelphia school faculties were still racially identifiable and thus, that a racial imbalance existed. The OCR concluded that the District would not be eligible for ESAA funds unless in the ESAA regulations promulgated pursuant to the Act. Letter from OCR to Superintendent of School District of Philadelphia (June 22, 1978) and Letter from OCR to Superintendent of School District of Philadelphia (August 8, 1978).

In order to maintain eligibility for the ESAA funds, the District agreed to adopt the 75%/125% OCR policy. Under the policy, each individual school in the District would be required to employ between 75% and 125% of the existing proportion of black teachers employed city-wide at that school's respective level (elementary school, middle or junior high school, and high school) in the school system. Resolution of Board of Education of School District of Philadelphia (August 21, 1978); *see* Letter from Legal Counsel for School District of Philadelphia to OCR (August 22, 1978). According to the OCR, adherence to these federal guidelines would result in complete faculty racial integration in all of the schools of the District.

As a result of the quota system, minimum and maximum limits were placed upon the number of black and white teachers who could be assigned to each school within the system. For example, if 40% of the District's elementary school teachers were black, each elementary school would be required to employ between 30% to 50% black teachers, i.e., 75% to 125% of 40%. In an elementary school with 10 teachers, 3 to 5 would have to be black under the OCR 75%/125% quota. In another example, if 50% of the District's high school teachers were black, each high school would be required to employ between 37.5% to 62.5% black teachers, i.e., 75% to 125% of 50%. Thus, in a high school with 10 teachers, 4 to 6 would have to be black under the OCR 75%/125% quota.

In September, 1978, September, 1979, September, 1980, and December, 1981, the District required a number of teachers to be involuntarily transferred because of decreases in student enrollment. In order to meet the needs of reassigning teachers according to the decline in the number of students, keeping in mind the restrictions imposed by the 75%/125% quota, the following formula was used to implement the involuntary transfers: When a transfer was needed from a particular

school, the least senior teacher of the race of which the school was racially identifiable would be the one who would be transferred. For example, if a school was racially identifiable as white under the 75%/125% quota, the least senior white teacher would be transferred, even though that white teacher had more school seniority than a similarly situated black teacher. Moreover, after a teacher's transfer out of a particular school, his or her placement in a new school was controlled by his or her race because of the need to maintain the faculty integration levels at all schools within the 75%/125% standard. Thus, a teacher was subject to being involuntarily transferred out of a particular school solely on the basis of race, and then was subject to a restriction in the choice of schools to which he or she could be reassigned solely on the basis of race. On a few occasions, teachers were involuntarily transferred out of a school solely on the basis of race without a specific numerically related need for the reassignment of that teacher, because of the District's singular desire in these cases to meet the 75%/125% standard.

On December 8, 1981, four white kindergarten and elementary school teachers, Lorraine Kromnick, Lorraine Brancato, Gladys Hirsh, and Regina Katz, brought this suit seeking declaratory and injunctive relief because they were potentially subject to involuntary transfers on the basis of their race under the 75%/125% racial quota. On December 29, 1981, the Court denied plaintiff's motion for a preliminary injunction because it found that the imposition of the 75%/125% quota was justified in view of the OCR's administrative finding of an existing racial imbalance. N.T. 1-7 to 1-10. At a subsequent hearing, the Court directed the District to contact OCR with respect to any further need to continue the 75%/125% quota. The District requested OCR to undertake a review of the racial balance of the school faculties.

On June 23, 1982, OCR informed the District that, based on a review of the District's assignment of its teachers under the ESAA 75%/125% quota, the District was determined to be "substantially in compliance with the agreement" and that the "district is under no further obligation to continue to meet the 75%/125% standard." Letter from OCR to Superintendent of School District of Philadelphia (June 23, 1982). OCR noted, however, that the "district is free to continue to maintain this standard [75%/125%] if it so chooses." *Id.* OCR emphasized that "while the district is not required to meet strict racial ratios, the district must continue to use nondiscriminatory policies in the hiring, firing and assignment of teachers." *Id.*

On August 2, 1982, the School Board of Philadelphia decided to continue the 75%/125% quota system in order to maintain faculty integration. The purpose of the quota as presently applied under the School Board's decision is not to remedy past discrimination in teacher assignments, but to guard against the possibility that the system will revert to its pre-1978 level of racial imbalance in faculty assignments. Thus, the basic character of the 75%/125% standard as now voluntarily applied by the District at its own discretion is that of an elective racial quota.

II. Discussion

The question presented is whether the District's retention of the 75%/125% quota to maintain faculty racial balance violates the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* This issue is one of first impression as past cases have only addressed the question of whether such a quota system can be used as a remedial device and have never faced the question of

whether a quota can be used to maintain the status quo once the past discrimination has been remedied.

The starting point for any discussion of the quota issue is the United States Supreme Court's landmark decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, a white student challenged the validity of a racial quota used by the Medical School of the University of California at Davis to assure the admission of at least sixteen minority students to the medical school. Allan Bakke contended that the quota system violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*, and the Equal Protection Clause to the Fourteenth Amendment. The Court in a 5-4 decision struck down the school's quota system. Unfortunately, the Court was divided in its reasoning and a majority opinion was not issued.

Justice Powell, in announcing the judgment of the Court, held that the racial quota was unconstitutional because it failed to pass muster under the strict scrutiny test. Justice Powell stated:

> We have held that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest."
>
> . . .
>
> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. . . . After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated.

438 U.S. at 305, 307 (Powell, J.) (citations omitted). Applying this test to the facts of the case, Justice Powell concluded that the medical school had failed to show that the challenged classification was necessary to promote a substantial state interest. *Id.* at 319-320. Justice Powell emphasized that race could be considered as a "factor" but that it could not be used in the sense of a strict quota. *Id.* at 317-318. Chief Justice Burger and Justices Stewart, Rehnquist and Stevens concurred in part and dissented in part. They agreed that the quota was invalid, however, they held that because it was prohibited by Title VI, the constitutional question need not be addressed. 438 U.S. at 418-421. (Burger, C.J., Stewart, Rehnquist, Stevens, JJ. concurring in part and dissenting in part). They determined that the issue of whether race could be considered as a factor was not an issue in the case. *Id.* at 411. Justices Brennan, White, Marshall and Blackmun also concurred in part and dissented in part. They decided that the quota system was not unconstitutional because it furthered a substantial state interest. 438 U.S. at 378-379 (Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part). In achieving this result, they employed the following standard for examining racial classifications with a remedial purpose: "racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.' " *Id.* at 359 (citations omitted).

A second landmark decision necessary to any discussion of this issue is the Supreme Court's pronouncement in *United Steel Workers of America v. Weber,* 443 U.S. 193 (1979). In *Weber,* white workers brought a challenge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, against a voluntary affirmative action plan which had been agreed to by the Kaiser Aluminum Company and the United States Steelworkers. Under the plan, black workers were reserved 50% of

the openings in an in-plant craft-training program until such time as the percentage of black craft-workers in the plant equaled the percentage of blacks in the local labor force. The Kaiser-USWA plan did not involve state action and thus did not present an equal protection issue. The Court, refusing to strike down the questioned plan, held that Title VII, in prohibiting racial discrimination in employment programs, does not prohibit all private, voluntary, race-conscious affirmative action plans. *Id.* at 207-208. The Court stated:

> We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line. . . . The plan does not require the discharge of white workers and their replacement with new black hirees. . . . Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, *the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the percentage of blacks in the local labor force.*

Id. at 208-209 (emphasis added) (citations omitted).

In the present case, the District has continued the use of a 75%/125% racial quota in order to maintain racial balance. Although *Bakke* and *Weber* are not precisely on point, they provide useful guidance for assessing when and for what purposes racial quotas can be used.

A. Equal Protection

The Equal Protection Clause to the Fourteenth Amendment provides: "[N]or shall any State . . . deny to

any person within its jurisdiction the equal protection of the laws " Plaintiffs do not dispute that the District's use of the 75%/125% quota to remedy past discrimination in the form of a faculty racial imbalance was lawful and proper under the standards imposed by the Equal Protection Clause, because of the OCR's administrative finding of racial imbalance. *See Regents of University of California v. Bakke, supra,* 438 U.S. at 307-308 (once judicial, legislative or administrative findings of constitutional or statutory violations have been made, governmental interest in preferring members of injured groups at the expense of others is substantial). Plaintiffs contend, however, that the continuance of the 75%/125% quota system is unconstitutional because it is *permanent* rather than *temporary* and because it serves to *maintain racial balance* rather than to *remedy past discrimination.*

Since the quota system classifies on the basis of race, the District has the burden of showing that the quota system passes muster under the Fourteenth Amendment. *Regents of University of California v. Bakke, supra.* Unfortunately, the *Bakke* Court did not make clear whether the appropriate standard of review for an affirmative action racial quota is a strict scrutiny or a "middle tier" analysis. Nonetheless, the Court finds that the District's race conscious quota fails to pass muster under either test.

In the present case, the District argues that continued use of the 75%/125% standard shelters the important governmental objective of maintaining racially balanced faculties and schools, thus enhancing the educational environment of the students. Then, relying on its own conclusion that absent the quota system the racial composition of its faculties would revert to prior levels of segregation, the District argues that it has met its burden of showing that continuance of the quota system is substantially related to achievement of that objective. The Court cannot agree. Although the governmental

objective of maintaining desegregated school faculties in order to enhance the educational opportunities of the school children is indeed a legitimate and important objective, the District has failed to show that the quota is substantially related to the achievement of that objective.

First, the District has failed to show through empirical evidence that the system will revert back to prior levels of segregation if the quota system is not maintained. Sheer speculation as to what will happen if the quota system is lifted and nondiscriminatory policies in the hiring, firing and assignment of teachers are used, will not support the continuance of the racial quota. Second, the District has failed to show that other nondiscriminatory alternatives for maintaining faculty integration cannot be applied.

Generally, a racial quota is a temporary measure constructed both to remedy past discrimination and to achieve the desired result of either equality or desegregation. *See, e.g., United Steel Workers of America v. Weber, supra; Swann v. Charlotte-Mechlenburg Board of Education,* 401 U.S. 1 (1971). All of the cases cited by the District in support of the racial quota are distinguishable from the present facts. In each of those cases, the quota system was used to remedy past discrimination and not to maintain racial balance. *See, e.g., Swann v. Charlotte-Mechlenburg Board of Education,* 401 U.S. 1 (1971); *Caulfield v. Board of Education of City of New York,* 632 F.2d 999 (2d Cir. 1980); *Zaslawsky v. Board of Education of Los Angeles City Unified School District,* 610 F.2d 661 (9th Cir. 1979). *See also Regents of University of California v. Bakke, supra,* 438 U.S. at 300 n.39 (dictum). It is of no moment that the simple expectation of being assigned to a particular school within the school system is not a property interest protected under the Constitution. *See Caulfield v. Board of Education of City of New York, supra,* 632 F.2d at 1006-1007. ("The simple expectation of being assigned to a particular school

within the system is not, then, a right protected under Title VI, Title IX or the Constitution.") Even assuming that this be true, each individual still has the constitutional right under the equal protection guarantee to be protected from distinctions based solely on race in the absence of a substantial state interest in support of the racial classification. *Regents of University of California v. Bakke, supra* 438 U.S. at 289-291. This right constitutes a liberty interest under the Equal Protection Clause of the Fourteenth Amendment based on the right to racial equality. *See Regents of University of California v. Bakke, supra,* 438 U.S. at 294.

B. Title VII

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) provides:

> (a) It shall be unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise *to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,* because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(Emphasis added). Title VII prohibits racial discrimination against whites on the same basis and under the same standards as it prohibits racial discrimination against blacks. *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 278-280 (1976). As stated earlier, the Supreme Court has held that not all voluntarily enacted programs which take race into considera-

tion are prohibited under Title VII. *United Steel Workers of America v. Weber, supra.* However, after reviewing the present quota system as currently applied by the District, the Court holds that the 75%/125% quota falls on the impermissible side of the demarcation between permissible and impermissible racially cognizant classifications. The salient and ultimately fatal characteristic of the District's quota system is that its only function is to preserve the existing racial percentages. This contrasts sharply with the remedial nature of the affirmative action plan approved by the Supreme Court in *Weber*. In view of *Weber* and after careful consideration of the purposes of Title VII, this Court concludes that while such a system may have been a permissible means of attaining a given racial balance, that system ventures into the impermissible range if it continues to allow race to be the sole criterion affecting employment once the desired end is actually met. To decide otherwise would be to sanction the persistent consideration of a particular human characteristic, race, that the law has declared shall not be an allowable basis for a distinction. Those decisions which have allowed race to be weighed under certain remedial affirmative action plans, did so in order to correct past vestiges of discrimination. The reasons supporting those decisions cannot be used to justify continued consciousness of race where, as here, the desired elimination of a particular discriminatory practice has been achieved.

Defendant points out that the 75%/125% quota does not require the discharge of white teachers and their replacement with black hirees, nor does it create an absolute bar to the advancement of white teachers since white teachers will still be able to teach although only in certain designated schools. Defendant also points out, and the Court agrees, that the quota's only effect is to impinge on an individual teacher's selection of certain schools within which he or she may teach. Defendant cites *Caulfield v. Board of Education of the City of New*

York, 632 F.2d 999 (2d Cir. 1980), in support of the proposition that the mere expectation of being assigned to a particular school within the district on the basis of seniority is not a right protected under Title VII. *Caulfield,* however, is not on point. In *Caulfield,* the court stated:

> Although teachers do have cognizable interest in avoiding transfer within the system from one school to another, *Rodriguez v. Board of Education,* 620 F.2d 362 (2d Cir. 1980), the teachers' interest is a limited one. Under *Rodriguez,* the teachers have an interest, under Title VII, in being free from transfers that "constitute a serious professional setback" and *that are made for improper reasons* such as sex discrimination. *See Id.* at 365-66.

632 F.2d at 1006 (emphasis added). *Caulfield,* however, was decided on the basis that the quota system was needed to remedy possible Title VI and Title IX violations. *Id.* The court considered this remedial purpose in assessing the interests of the faculty and whether or not the transfers were made "for improper reasons." The present case is clearly distinguishable from the facts of *Caulfield.* Clearly, the expectation of being assigned to a particular school within the District on the basis of seniority constitutes a term, condition, or privilege of employment. Thus, the involuntary transfer of a teacher from a particular school solely on the basis of race and the imposed restriction on the selection of a new school solely on the basis of race constitutes racial discrimination with respect to the "terms, conditions or privileges of employment." Such discrimination is prohibited by Title VII under all the circumstances and this Court cannot allow it to stand. The quota is permanent and not temporary. Its purpose is to preserve the status quo and not to remedy past discrimination. However desirable it is to maintain racial balance, school teachers cannot be deprived of their rights under Title VII. The District must

explore other nondiscriminatory alternatives, apart from a strict racial quota system, in its effort to maintain the existing levels of racial integration among the faculty.

C. Relief

The District will be enjoined from using the 75%/125% quota system as applied to involuntary transfers in selecting teachers to be involuntarily transferred and in restricting the selection rights of teachers required to be involuntarily transferred. The relief granted will be prospective from the date of this decision, and will not revert back to September, 1982, because of the District's good faith reliance upon the OCR determination of June 23, 1982, that the District could continue its use of the 75%/125% standard. Letter from OCR to Superintendent of the School District of Philadelphia (June 23, 1982) ("Of course, your district is free to continue to maintain this standard [75%/125%] if it so chooses."). Other alternatives must now be explored by the District apart from a strict racial quota in order to maintain racial balance in school faculties across the District.

III. Conclusions of Law

1. This Court has jurisdiction pursuant to 28 U.S.C. §1343 and 42 U.S.C. §2000e-5.

2. The District's use of the 75%/125% quota as applied to involuntary transfers of school teachers from August, 1978 to June, 1982 to remedy racial imbalance in District school faculties did not violate the Equal Protection Clause to the Fourteenth Amendment or Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

3. The District's use of the 75%/125% quota as applied to involuntary transfers of school teachers from August, 1982 to the present day to maintain racial balance in District school faculties without resort to nondiscriminatory alternatives violates the plaintiffs' rights

under the Equal Protection Clause to the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

4. Plaintiffs are entitled to an injunction restraining the District from further use of the 75%/125% quota system as applied to involuntary transfers in selecting teachers to be involuntarily transferred and in restricting the selection rights of teachers required to be involuntarily transferred.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LORRAINE KROMNICK, LORRAINE BRANCATO, GLADYS HIRSH, and REGINA KATZ	:	CIVIL ACTION
v.	:	
SCHOOL DISTRICT OF PHILADELPHIA and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF PHILADELPHIA	:	No. 81-5013

ORDER

AND NOW, TO WIT, this 17th day of January, 1983, for the reasons stated in the foregoing Memorandum, IT IS ORDERED that the School District of Philadelphia and the Board of Education of the School District of Philadelphia is hereby *enjoined* from using the 75%/125% quota system as applied to involuntary transfers in selecting teachers to be involuntarily transferred and in restricting the selection rights of teachers required to be involuntarily transferred.

LOUIS C. BECHTLE, *J.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LORRAINE KROMNICK, LORRAINE BRANCATO, GLADYS HIRSH, and REGINA KATZ	:	CIVIL ACTION
v.	:	
SCHOOL DISTRICT OF PHILADELPHIA and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF PHILADELPHIA	:	No. 81-5013

ORDER

AND NOW, TO WIT, this 10th day of February, 1983, IT IS ORDERED as follows:

1. Defendants' motion for new trial is *denied*. Defendants were given a full opportunity to demonstrate the effect of "social forces" on faculty integration at the trial on September 1 and September 2, 1982, with oral argument on December 3, 1982. Defendants' motion fails to set forth any new evidence with respect to the impact of "social forces" on faculty integration.

2. Plaintiffs' motion to alter or amend judgment is *granted*. IT IS ORDERED that defendants, prior to making teacher assignments for the 1983-1984 school year, restore to their former schools all teachers transferred from August, 1982 to January 17, 1983 (1) who can establish that they would not have been transferred but for utilization of the 75/125 quota system, and (2) who file a right to return to their former schools with defendants no later than May 15, 1983.

LOUIS C. BECHTLE, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1144

KROMNICK, LORRAINE and BRANCATO, LORRAINE and HIRSH, GLADYS and KATZ, REGINA

vs.

SCHOOL DISTRICT OF PHILADELPHIA and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF PHILADELPHIA,

Appellants

(D.C. Civil No. 81-5013)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS and SLOVITER, *Circuit Judges* and CALDWELL, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel November 29, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said

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* Honorable William W. Caldwell, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

District Court, entered January 18 and February 14, 1983, be, and the same are hereby reversed in accordance with the opinion of this Court. Costs taxed against appellees.

ATTEST

SALLY MRVOS
Clerk

July 17, 1984

Certified as a true copy and issued in lieu of a formal mandate on August 8, 1984.

TEST:

BETTY J. ROBINSON
Deputy Clerk,
U.S. Court of Appeals
for the Third Circuit

FILED
NOV 29 1984
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-606

LORRAINE KROMNICK, LORRAINE BRANCATO, GLADYS HIRSH and REGINA KATZ,
Petitioners

v.

SCHOOL DISTRICT OF PHILADELPHIA and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF PHILADELPHIA,
Respondents

On Petition For a Writ of Certiorari To The United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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22pp

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-606

LORRAINE KROMNICK, LORRAINE BRANCATO, GLADYS HIRSH and REGINA KATZ,

Petitioners

v.

SCHOOL DISTRICT OF PHILADELPHIA and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF PHILADELPHIA,

Respondents

On Petition For a Writ of Certiorari To The United States Court of Appeals for the Third Circuit

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COUNTER-STATEMENT OF THE CASE

This case deals with the constitutional and statutory validity of a race-conscious teacher transfer policy adopted and maintained by a public school district in order to remedy judicially-recognized and ongoing *de facto* segregation, and to insure to children within every school in the district the educational benefits of racially diverse faculties. The policy, known as "75/125", prefers no racial group over another, neither on its face nor in appli-

cation; it requires the firing or lay-off of no teacher; it affects no monetary benefit; and it allows teachers who are involuntarily transferred pursuant to the policy to retain accumulated "building seniority" in their new schools and preference with respect to future vacancies at their former schools. Furthermore, the policy has been repeatedly adopted by petitioners' collective bargaining unit in biennial contract negotiations.

The 75/125 policy is but one part of a 20-year effort by the School District of Philadelphia ("School District") to eradicate the earmarks of *de facto* segregation from its school system. The policy's purpose and impact extend beyond the narrow objective of integrating school faculties: by achieving and maintaining faculty integration within the numerous schools in the system, the School District has eliminated the role which racially segregated school faculties formerly played in perpetuating the implication that particular schools were intended for students of a particular race. Thus, 75/125 has become one of several devices employed by the School District in a continuing program to satisfy directives from state judicial and administrative authorities to remedy the racial isolation of black public school students.

Petitioners seek to obscure the breadth of the context in which 75/125 was adopted and maintained. They would have it appear that once the school faculties were desegregated, there was no reasonable basis for the School District to continue to employ the policy. Petitioners therefore begin their statement of the history of this policy in June, 1982, when the Office of Civil Rights of the United States Department of Education ("OCR") determined that the School District was "substantially in compliance" with regulations which required the School District as a condition of eligibility for federal aid under the Emergency School Aid Act (ESAA), 20 U.S.C. §3191-3207 (repealed effective October 1, 1982), to undertake remedial action to correct a policy or practice of "racially identifiable" teacher assignments. While relieving the

School District of any further obligation under Department regulations to comply with the 75/125 policy, OCR, in a June, 1982 letter, stated that the School District was "free to continue to maintain [the policy] if it so chooses," and admonished the School District of its continuing obligation to use nondiscriminatory policies. On August 2, 1982, consistent with OCR's advice, the School District chose to continue the 75/125 policy. It is the subsequent period of voluntary adherence to 75/125 which petitioners contend offends Title VII and the 14th Amendment to the Constitution.

In fact, a more accurate exposition of the history of this case would begin substantially earlier than 1982, and even earlier than 1978, when 75/125 was adopted by the School District in order to obtain federal funding to support its desegregation effort. It would begin as early as 1965 when the School District began utilizing race as one factor in determining assignments of newly hired teachers in order to attain integrated faculties in all schools throughout the school system. In 1968, the Pennsylvania Human Relations Commission ("PHRC"), a state agency invested with authority to require school districts to take corective measures to overcome both *de jure* and *de facto* segregation,[1] initiated proceedings to compel the School District to eliminate racially identifiable schools in Philadelphia.[2]

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1. *Balbaugh v. Rowland*, 447 Pa. 423, 438, 290 A.2d 85, 93 (1972); *Pennsylvania Human Relations Commission v. Chester School District*, 427 Pa. 157, 233 A.2d 290 (1967).

2. The Third Circuit Court succinctly summarized the protracted history of PHRC's litigational efforts to compel the School District to adopt measures which PHRC felt would be most effective in remedying the intractible pattern of *de facto* segregation within the Philadelphia public school system. *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 897, 904-905 n.10. (3d Cir. 1984). The numerous court decisions which have been rendered in the state litigation, while acknowledging good faith efforts on the part of the School District, *see, e.g., Pennsylvania Human Relations Commisison v. School District of Philadelphia*, 66 Pa. Commonwealth

Integral to the School District's response to PHRC's desegregation demand was a contract provision agreed upon by the School District and the teachers' union which prescribed that the faculty in each elementary school shall consist of at least 20% of the race in the minority, and in each secondary school, shall consist of at least 10% of the race in the minority. In order to implement this numerical goal, the School District and union agreed that newly hired teachers would be assigned race-consciously to integrate racially identifiable faculties. They also agreed to encourage voluntary teacher transfers which would aid racial balance and to restrict voluntary transfer options if the transfers would delay elimination of or create racially identifiable faculties. The provision prescribed both limiting the placement choices of involuntarily transferred teachers so that their choices would not create or exacerbate racial identification, and deviating from the use of strict seniority to determine transfers out of a school when adherence to seniority ranking would adversely affect the racial balance of the school. In 1969, this so-called "80/20-90/10" standard was incorporated into a consent decree between the School District and PHRC. The policy remained in effect until, in 1978, it was supplanted by 75/125. Thus, for more than a decade prior to the adoption of 75/125, the School District employed race-

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NOTES *(Continued)*

Ct. 154, 178, 443 A.2d 1343, 1352 (1982), have consistently supported PHRC's findings that the Philadelphia school system continues to be racially polarized. For example, in 1982, the Commonwealth Court of Pennsylvania wrote:

> Thus today as in 1977 over two-third of all the black public school students in Philadelphia attend schools that are racially isolated containing proportions of black students in excess of 90%. . . . [W]e decide, as have other courts faced with the same issue and comparable facts, that a desegregation plan which leaves unaffected a substantial number of racially identifiable schools containing a high proportion of black students is insufficient. . . .

Id, 66 Commonwealth Ct. at 174, 179-180, 443 A.2d at 1352, 1354.

conscious assignment procedures—procedures which petitioners concede were reasonable and appropriate[3]—in order to move toward its goal of a unitary school system.[4]

In 1978, pursuant to the School District's application for federal funds for desegregation, OCR concluded that the School District's adherence to the numerical goals imposed under the consent decree with PHRC was insufficient to excuse the fact that many schools were ra-

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3. Petitioners have contended throughout this litigation that the School District should have pursued its integrational objective through other race-conscious means. *See Kromnick*, 739 F.2d at 908; Certiorari Petition at p. 21.

4. Contrary to petitioners' assertion that the 1969 consent order reached by the School District and PHRC was "completely independent of the protracted efforts by the PHRC and the state courts of Pennsylvania to achieve student desegregation, "Certiorari Petition at p.4, it is clear that both the School District and PHRC envisaged faculty integration as a tool and a benchmark in the broader quest for a unitary system. Each collective bargaining agreement between the teachers union and the School District from 1965 onward contained language attesting to the link between district pupils' right to educational equality and racial balance within school faculties. From 1968 onward each contract contained the following statement of policy: "The Board and the Federation agree that all children are entitled to an equal opportunity to obtain quality integrated education. This goal includes the presence of a meaningful number of experienced teachers in all schools and racial balance in faculties."

Meanwhile, PHRC's perspective on the relationship between faculty integration and school desegregation was reflected in a document prepared by it and the Pennsylvania Department of Public Instruction (now the Department of Education) entitled "Recommended Elements of a School Desegregation Plan." The document, which was prepared in 1968 and thereafter used as a guide for school authorities, identified as one of eleven factors which should be addressed when developing a desegregation plan, "Does the desegregation plan include procedures to affirmatively and effectively recruit and assign an integrated staff at all levels for all schools?" *Pennsylvania Human Relations Commission v. School District of Philadelphia*, 23 Pa. Commonwealth Ct. 312, 317, 352 A.2d 200, 203 (1976).

cially identifiable by their student populations. OCR also found that many schools, in addition to having racially lopsided student populations, were readily identifiable by racial composition of their teaching staffs as intended for students of a particular race. Furthermore, OCR intimated that the School District, by continuing to allow teacher choice to determine teaching assignments, was engaged in a *conscious* policy of racial segregation. In a letter addressed to the School District's Superintendent, the Associate Commissioner for Equal Educational Opportunity Programs within the Department of Health, Education and Welfare charged:

> [I]t is clear that compliance with the [PHRC consent] order . . . was not sufficient to overcome the persistent pattern of racial identification of schools by faculty assignment. Moreover, the district took no action to remedy that pattern beyond the minimal compliance with the PHRC order. In fact, the district has continued to allow teacher choice to determine teaching assignments even though, as the district representatives admitted, residential areas in the city are *de facto* segregated and teachers tend to choose schools nearest to their homes. *Thus it is our view that the natural, probable and foreseeable result of your district's teacher assignment policies was to maintain the racial identifiability of schools by the composition of their teaching staffs.* (Emphasis added.)

See Kromnick, 739 F.2d at 898. Against this backdrop, the School District adopted 75/125, and as a result, received federal funds for desegregation.

When, in 1982, the Philadelphia School Board convened to consider whether to continue implementation of 75/125, the backdrop had changed to the extent that, as a result of 75/125, the faculties throughout the school system were racially integrated. In other regards, however, circumstances were unaltered: in 1982, as in 1977,

over two-thirds of all black public school students in the system attended school where blacks represented more than 90% of the student population;[5] the School District was still under directives from PHRC and the Pennsylvania courts to redouble its efforts "to achieve more comprehensive desegregation," *Pa. Human Relations Commission v. School District of Phila., supra,* 66 Pa. Commonwealth Ct. at 179-180, 443 A.2d at 1355; the residential areas encompassed by the School District were still *de facto* segregated, *see id.* at 66 Pa. Commonwealth Ct. at 178, 443 A.2d at 1354; and, according to a report prepared by the School District's Executive Director of Personnel and Labor Relations, there continued to be both a limited number of open positions in the system, making race-conscious initial assignments an ineffective means of maintaining faculty integration, and a proclivity on the part of teachers to choose schools where the race of the majority of the students is the same as their own. Thus, the very same factors which led OCR, in 1978, to prescribe implementation of 75/125 still existed when the School Board in 1982 determined to continue the policy voluntarily.

In the Fall of 1983, the School District reached a new agreement with PHRC under which it undertook to desegregate 50 targeted schools by the 1988-89 school year. A critical factor in the School District's plan to achieve this goal—a plan which relies on voluntary student transfers rather than forced busing—is its ability to ensure to each parent and pupil in the system that the faculty at his or her school will be both qualified and integrated. Contrary to petitioners' assertion, the lengthy student desegregation proceedings discussed by the court of appeals have not terminated. *See* Certiorari Petition at pp. 13-14. The Commonwealth Court of Pennsylvania

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5. *Pennsylvania Human Relations Commission v. School District of Philadelphia,* 66 Pa. Commonwealth Ct. at 174, 443 A.2d at 1352.

retains jurisdiction over the case. Furthermore, should PHRC conclude in June, 1987 that the School District has not accomplished maximum feasible desegregation, PHRC will, under the terms of the agreement, petition the state court for evaluation of the School District's desegregation efforts by a court-appointed expert panel, and for an order enjoining the School District to take the necessary steps to achieve maximum feasible desegregation.

REASONS FOR DENYING THE WRIT

1. This Case Presents No Important Constitutional Or Statutory Issue.

Despite petitioners' attempts to make it appear otherwise, this case presents no novel or compelling issues of federal constitutional or statutory significance. The challenged policy is a modest one; it creates no racial preference, abrogates no seniority rights, affects no vested interest of the petitioners, imposes no stigma; and it is substantially related to the legitimate governmental objective of achieving and maintaining a desegregated school system. Race-conscious measures having far greater impact on individual interests and expectations have been validated by this Court. *See e.g., Fullilove v. Klutznick,* 448 U.S. 448 (1980); *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979).

Petitioners, nevertheless, assert that this case presents the Court ". . . with its first oportunity to determine whether traditional prohibitions on governmental consideration of race should take effect once the remedial objectives of race-based employment policies are satisfied." Certiorari Petition at p. 12. By misrepresenting the issue in this fashion, petitioners seek to inflate the legal significance of this case. Petitioners focus exclusively on OCR's 1982 finding that the School District's faculties were racially balanced in order to argue that faculty integration was an end in itself, unrelated to the

School District's efforts to remedy a stubborn pattern of *de facto* segregation in all aspects of the system. They ask the Court to ignore published PHRC guidelines which measure the efficacy of a system-wide desegregation plan, in part, on the basis of the steps taken by a school district to assign and maintain integrated faculties and staff. They would have the Court overlook biennially-adopted policy statements attesting to the School District's and the teachers' union's acknowledgement of the importance of integrated faculties to providing a quality education to each child in the school system. They would obscure the fact that an explicit basis for OCR's insistence on the School District's adoption of 75/125 was that racially identifiable faculties were a means of identifying schools as intended for students of a particular race. These facts undermine petitioners' attempts to deny the continuing remedial significance of 75/125 after 1982.[6] Moreover, since petitioners predicate their argument of this case's importance on the alleged absence of a remedial purpose behind 75/125, these facts constitute a thorough rebuttal to petitioners' claim that this case warrants Supreme Court review.

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6. The School District believes that remediation of past discrimination or unlawful racial segregation is not the only purpose that will justify its adoption of a carefully designed race-conscious policy. No case has impaired the validity of the Court's statement in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) that "School authorities . . . might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the board discretionary powers of school authorities. . . ." 403 U.S. at 16. Integration of school faculties is as legitimate and important a governmental objective as integration of the student population. *Porcelli v. Titus*, 431 F.2d 1254, 1257 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971). Thus, the School District submits that 75/125 would be permissible even in the absence of a determination that its purpose was remedial.

Petitioners contend that unless the Court grants the writ, the School District can permanently insulate 75/125 from judicial review by merely invoking fear of the consequences of any alternative measure; they assert that the School District will be encouraged to justify a race-conscious assignment policy on the basis of an illogical link between 75/125 on the one hand, and student integrational objectives on the other—objectives which petitioners claim the School District itself has abandoned. Certiorari Petition at p. 13. These arguments are without merit.

First, it could not be clearer that the circuit court scrupulously reviewed the record to determine whether the School District's concern that its faculties would revert to their previous level of racial imbalance was a rational one. *See Kromnick*, 739 F.2d at 908. Nor could it be clearer that the circuit court's decision was limited to the factual circumstances before it. The court explicitly declined to express an "opinion as to whether continued application of the 75%/125% plan would create an unconstitutional discrimination if there is a substantial change in facts." *Id.*, 739 F.2d at 908-909.

Furthermore, petitioners are alone in ascribing some inherent illogic to tying faculty integration to student desegregation goals. Even the district court acknowledged that ". . . the governmental objective of maintaining desegregated school faculties in order to enhance the educational opportunities of the school children is indeed a legitimate and important objective. . . ." *Kromnick v. School District of Philadelphia*, 555 F. Supp. 249, 254 (E.D. Pa. 1983). Of course, this Court has long recognized the significance of faculty assignments as indicia of a segregated system, *see Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971), and the appropriateness of faculty integration as a remedy for *de jure* segregation. *See United States v. Montgomery County Board of Education*, 395 U.S. 225, 235-36 (1969) and other cases cited at *Kromnick*, 739 F.2d at

905-906. This Court has also upheld congressional enactments prescribing faculty integration as a response to *de facto* segregation. *See Board of Education v. Harris*, 444 U.S. 130, 142-44 (1978). Thus, the circuit court's recognition that 75/125 played an appropriate role in the ongoing effort to desegregate the Philadelphia school system is completely consistent with the holdings of this Court.

Whatever important questions regarding the permissible uses of race-conscious measures remain to be addressed by the Court, *see, e.g., Firefighters Local Union No. 1784 v. Stotts*, ____U.S. ____, 104 S.Ct. 2576, 2590 (1984), petitioners have identified none which is squarely presented by this case.

2. The Decision Of The Circuit Court Conflicts With Neither The Holdings Of This Court Nor Decisions Of Other Circuit Courts.

Petitioners contend that in validating a race-conscious policy which was not necessary to remediate past discrimination in teacher assignments, the circuit court offended holdings of this Court in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), and *Stotts*. Petitioners contend that those cases hold that " . . . governmental race-conscious measures employed for 'benign' purposes . . . " are invalid unless they are "custom-tailored to satisfy specific remedial objectives." Certiorari Petition at p. 15. This attempt to fabricate a conflict between the circuit court's opinion and the opinions of this Court again hinges on petitioners' unsustainable argument that 75/125 was, and could have been employed in furtherance of a remedial purpose no broader than elimination of segregated faculties. It also assumes a nonanalytical approach to the *Bakke* and *Stotts* decisions.

Of course, *Bakke* addressed a policy which established a clear and rigid racial preference, as contrasted

with 75/125, which sets a 50 percentage point range within which the integrational goal can be met and affects blacks and whites equally. While the absence of an Opinion of the Court forecloses any affirmative reliance on *Bakke* as an expression of court doctrine, a survey of the opinions of the various Justices evidences a majority viewpoint that benign race-conscious measures do not necessarily offend the Constitution. Furthermore, there is a conspicuous absence within the various opinions of support for the proposition that benign race-conscious measures may only be justified by application of a strict scrutiny standard.

Stotts too is readily distinguishable on its facts from the circumstances in this case. Whereas in *Stotts*, the district and circuit courts compromised bona fide seniority rights of white employees for the benefit of blacks over the opposition of both the governmental employer and the affected union, in this case, 75/125 was agreed to by the School District and the Union, and it neither creates a racial preference nor abrogates any seniority right. Furthermore, the issue addressed in *Stotts* was the limits of judicial power to prescribe remedies which are racially preferential and override protected seniority rights. Nothing in that decision even addresses, let alone conflicts with the proposition that the Constitution or Title VII permits a voluntary race-conscious policy which is nonpreferential, does not override contractual seniority rights, and is substantially and reasonably related to a governmental remedial goal. Indeed, the Court expressly declined in *Stotts* to decide whether the racially preferential measure challenged there, had it been voluntarily adopted by the City of Memphis, would have run afoul of Title VII. *Stotts*, ____ U.S. ____, 104 S. Ct. at 2590. There can, therefore, be no colorable merit to petitioners' claim that the Court's opinion in *Stotts* interdicts a policy such as 75/125 which is nonpreferential and was voluntarily adopted by a competent governmental authority.

Just as petitioners have failed to identify conflicting Supreme Court holdings, they also have failed to marshal cases to support their argument that the circuit court's decision is in conflict with the holdings of other circuit courts. The two cases which they cite, *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757 (6th Cir. 1983) and *Fort Bend Independent School District v. City of Stafford*, 651 F.2d 1133 (5th Cir. 1981), dealt with the limits of judicial authority to interfere with the decision-making power of local school authorities, *not* with the power of school authorities to voluntarily adopt limited race-conscious measures for legitimate and substantial reasons. The very first sentence of the *Oliver* decision defines the issues the court was addressing: "The issues presented in this proceeding involve the scope of *the district court's* remedial powers in a school desegregation case once a constitutional violation has been determined." 706 F.2d at 758 (emphasis added). Nowhere in the opinion is there even the suggestion that the Sixth Circuit Court undertook to determine the limits of a school district's discretion to adopt benign race-conscious educational policies.

Similarily, in *Fort Bend*, the issue concerned the limits on a federal district court to interfere in the political and administrative decision-making of local school authorities. The unusual circumstances in *Fort Bend* were that Fort Bend School officials sued to enjoin the merger of its district with another school district. The injunction was sought on the grounds that the proposed merger would interfere with efforts by the school district to eradicate the effects of past discrimination. The Fifth Circuit Court held that, as the Fort Bend School District had, by establishing a unitary school system, already remedied any past discrimination, the district court had no authority to enjoin the merger. It cannot reasonably be argued that this holding—that the absence of evidence of continuing vestiges of discrimination forecloses a federal

court from enjoining racially neutral attempts to alter or divide a school district—in some way conflicts with the ability of a school district to adopt voluntary non-preferential measures to serve remedial ends.

The circuit court's decision, rather than generating conflict, amply demonstrates through careful and thorough analysis of the relevant case authority, that the holding in this case is wholly consistent with the decisions of this Court and pertinent decisions in the other circuits. *See Kromnick*, 739 F.2d at 900-902, 903, 905-906, 906, 909.

3. This Is Not An Appropriate Case To Resolve The Issue Of The Standard For Determining The Constitutionality Of Benign Race-Conscious Measures.

The uniqueness and narrowness of the policy involved in this case makes it a poor vehicle for resolution of the complexities associated with determining the standard for judging the constitutionality of benign race-conscious measures. Policy 75/125 creates no racial preference; under this policy, blacks are equally likely as whites to be transferred involuntarily or have their placement options limited in order to preserve faculty integration. Therefore, review of this case would not afford the Court the opportunity to address the issue which is at the heart of the vast majority of affirmative action cases, namely the issue of the standard for determining the constitutional validity of benign race-conscious measures which benefit one race at the expense of another.

The absence of racial preference, moreover, makes it at least questionable whether this case is one of constitutional dimension. *See Kromnick*, 739 F.2d at 903. Petitioners heighten this doubt by their concession that other race-conscious measures, such as the School District's " . . . offering incentives to encourage teachers of a particular race to teach in schools where that teacher's race is in the minority" would be constitutionally per-

missible. *See Certiorari* Petition at p.21. It would thus appear that petitioners' grievance is not that the School District chose to employ a race-conscious device, but rather that it chose a race-conscious device which petitioners would not have chosen. Undoubtedly, the School District is vested with primary authority to determine which among an array of permissible devices best serves its legitimate educational objectives. *See Swann*, 402 U.S. at 16. Furthermore, as the circuit court observed, the School District chose 75/125 on the basis of a fund of knowledge and experience which amply supports the rationality of its choice of remedial device. *See Kromnick*, 739 F.2d at 908. The place for any further debate over the efficacy of this policy is the School District board room and the collective bargaining table—not the federal courts.

4. The Circuit Court Properly Reversed The District Court's Findings That 75/125 Was Not Remedial And That Only "Sheer Speculation" Supported The School District's Belief That Abandonment Of The Policy Would Lead To Reversion To Prior Levels Of Faculty Segregation.

As their final basis for urging the Court to grant certiorari, petitioners contends that review is necessary in order to vindicate the fact-finding competence of the district court. However, it is clear that the circuit court properly reversed the district court's findings that 75/125 had no remedial purpose and that no more than "sheer speculation" supported the School District's belief that abandonment of 75/125 would lead to reversion to prior levels of faculty segregation.

It is significant that the circuit court determined *as a matter of law* that the district court's concept of remedial was too narrow in light of the history of the desegregation effort in Philadelphia and the plethora of federal court decisions recognizing the remedial significance of faculty integration in pupil desegregation plans. *See*

Kromnick, 739 F.2d at 904-906. Furthermore, the circuit court properly found that the district court's "sheer speculation" finding was clearly erroneous in light of overwhelming and unrebutted evidence that the School District exercised its competence on the basis of years of experience with using race-conscious measures to achieve faculty integration, as well as on the advice of school officials who had responsibility for teacher assignments and who had studied the potential impact of changing the transfer policy. *See Kromnick*, 739 F.2d at 908. Moreover, the School District had the benefit of OCR's findings that the prior use of less restrictive race-conscious transfer policies had allowed teacher choice to perpetuate the existence of numerous racially identifiable school faculties within the system. Under these circumstances, the circuit court was well-justified in reaching a "definite and firm conviction that a mistake ha[d] been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the Judgment and Opinion of the Third Circuit Court of Appeals should be denied.

Respectfully submitted,

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